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No. 02-___

In The
Supreme Court of the United States

JOSEPH CUTRONA, WILLIAM READDY, and STANLEY GRIFFIS,

Petitioners,

v.

ESTATE OF SHANE G. SORRELLS, by and through its independent executrix Sheryl Thostenson, DANA FONTENOT, as next friend of Chandler Sorrells, a Minor, PAT SORRELLS, and RITA SORRELLS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Has the court of appeals decided whether Petitioners are entitled to qualified immunity in a way that conflicts with this Court's relevant decisions in *Saucier v. Katz*, 533 U.S. 194 (2001); *Wilson v. Layne*, 526 U.S. 603 (1999); and the prior cases of this Court upon which those decisions are based by failing to first determine whether Respondents have pleaded a constitutional violation at all and, if so, to then determine whether Respondents have alleged at the appropriate level of specificity that the constitutional right was clearly established?

2. Has the court of appeals decided whether Petitioners are entitled to qualified immunity in a way that conflicts with this Court's relevant decisions in *Saucier v. Katz*, 533 U.S. 194 (2001); and *Anderson v. Creighton*, 483 U.S. 635 (1987), by failing to consider the objective-reasonableness prong of the qualified-immunity analysis separately from the objective-reasonableness prong of an excessive force claim?

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties to the proceeding in the court of appeals are the Estate of Shane G. Sorrells, by and through its independent executrix Sheryl Thostenson, Dana Fontenot, as next friend of Chandler Sorrells, a Minor, Pat Sorrells, and Rita Sorrells, who are appellees and cross-appellants in the court of appeals and plaintiffs in the district court; the City of Dallas, which is cross-appellee in the court of appeals and defendant in the district court; and Joseph Cutrona, William Readdy, and Stanley Griffis, who are appellants in the court of appeals and defendants in the district court.

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CITATIONS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

The per curiam opinion of the court of appeals, in No. 01-10610, is not reported. (App. at 1-11.)[1] The district court's order, in Civil Action No. 3:99-CV-1185-P, is not reported. (App. at 12-13.) The findings and recommendation of the United States magistrate judge, in the district court action, are not reported. (App. at 14-41.)

BASIS FOR JURISDICTION IN THIS COURT

The judgment of the court of appeals was entered on July 10, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review on a writ of certiorari the judgment in question.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED IN THE CASE

The following constitutional provisions, statutes, and rules are involved in the case:

(1) U.S. Const. amend. IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue,

[1] For the Court's convenience, "App." refers to the appendix at the end of this petition, and "R." refers to the clerk's record of the proceedings in the U.S. District Court.

but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

(2) U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(3) 42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(4) Rule 56(b), Federal Rules of Civil Procedure

A party against whom a claim, counter-claim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(5) Rule 56(c), Federal Rules of Civil Procedure (in pertinent part)

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition

Respondents bring this action seeking damages against Petitioners under 42 U.S.C. § 1983 for alleged violations of Respondents' rights under the Fourth and Fourteenth Amendments to the U.S. Constitution. The district court has jurisdiction of this action under 28 U.S.C. § 1331. Petitioners' interlocutory appeal to the United States Court of Appeals for the Fifth Circuit arose from a decision of the district court that is final in effect and collateral – denial of Petitioners' motion for summary judgment based on qualified immunity. The court of appeals had jurisdiction of the interlocutory appeal pursuant to 28 U.S.C. § 1291. *See Behrens v. Pelletier*, 516 U.S. 299 (1996); *Johnson v. Jones*, 515 U.S. 304 (1995); *Mitchell*

v. Forsyth, 472 U.S. 511, 530 (1985); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

Respondents – the executor of the estate of Shane G. Sorrells, the next friend of the minor child of Shane G. Sorrells, and the parents of Shane G. Sorrells – filed this action against the City of Dallas, Petitioners, who are City of Dallas police officers, and other officials of the Dallas Police Department and Dallas Fire Department, alleging violations of the U.S. Constitution and state law arising from the death of Shane G. Sorrells following his arrest by Petitioners. (R. at 1-31.) Respondents bring their federal claims under 42 U.S.C. § 1983, alleging, *inter alia*, excessive force and failure-to-protect claims against Petitioners in their individual capacities. (*Id.*)

On September 29, 1999, Petitioners filed their motion for summary judgment under Rule 56(b) and (c), Federal Rules of Civil Procedure, asserting the affirmative defenses of qualified immunity as to Respondents' federal claims and official immunity as to Respondents' state-law claims. (R. at 47-60.) By order dated June 22, 1999, the district court had prospectively referred all dispositive motions to the United States Magistrate Judge for report and recommendation. (*See* District Court Docket Sheet at 6.)[2] Pursuant to that order, Petitioners' motion for summary judgment was duly referred to the magistrate judge for findings and recommendation.

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[2] The District Court Docket Sheet is numbered separately from the record on appeal.

On December 15, 2000, the magistrate judge held a hearing on the motion for summary judgment. (*See* District Court Docket Sheet at 13.) On December 18, 2000, the magistrate judge filed his findings and recommendation that the motion for summary judgment be denied as to Respondents' excessive force claim, failure-to-protect claim, and state-law claims against Petitioners, and be granted in all other respects. (App. at 14-41.)

Petitioners timely filed objections to the magistrate judge's findings and recommendation. (R. at 898-926.) Petitioners objected to the magistrate judge's recommendation that they be denied summary judgment on Respondents' excessive force, failure-to-protect, and state-law claims, and the recommendation that they be denied summary judgment on their qualified- and official-immunity defenses. (*Id.*)

By order entered March 30, 2001, the district court overruled Petitioners' objections and adopted the magistrate judge's findings and recommendation. (App. at 12-13.)

The Fifth Circuit Court of Appeals, in a per curiam opinion, affirmed the district court's order. (App. at 1-11.) Specifically, the court of appeals held that "[t]he district court correctly concluded that a genuine issue of material fact existed as to whether the Officers used excessive force and failed to protect Sorrells from the use of excessive force by their comrades." (App. at 6.) The court of appeals did not, however, address – as part of the qualified-immunity analysis, separate and apart from the objective reasonableness of the use of force for the excessive force claim – whether Respondents sufficiently pleaded the violation of a clearly-established constitutional right or

whether Petitioners' actions were objectively reasonable. (App. at 1-11.)

B. Statement of Facts

On September 17, 1998, Petitioners were dispatched to a disturbance call involving a man reportedly masturbating and exposing himself to children at an apartment complex in the City of Dallas. (R. at 97, 104.) The man, later determined to be Shane G. Sorrells ("Sorrells"), was sitting in the driver's seat of a locked vehicle parked in the apartment complex parking lot with the motor running. (R. at 98.) He was nude except for stockings and was masturbating in full view of the public. (R. at 98, 105.) A woman at the scene told one of the officers that children had seen Sorrells exposing himself. (R. at 98.)

Sorrells ignored Petitioners' commands to stop masturbating and unlock the car door. (R. at 98-99, 105.) Petitioners eventually broke one of the car windows and sprayed Sorrells with pepper spray. (R. at 91-92, 99, 105.) He still did not comply with their commands and they had to pull him out of the car while he continued to masturbate. (R. at 100, 106.) Sorrells resisted Petitioners' attempts to handcuff him and struggled with them. (R. at 93-94, 100, 106.) Various compliance techniques utilized by Petitioners were unsuccessful. (R. at 95, 100-01, 106-07.)

Additional officers responded to assist Petitioners, and Sorrells was finally restrained. (R. at 94-95, 101-02, 107, 110, 113-14.) Paramedics, who had been called because Sorrells had been sprayed with pepper spray and Petitioners had pepper spray in their eyes, also arrived. (R. at 95, 107.) While the paramedics were at the scene, Sorrells

stopped breathing. (R. at 96, 102, 107, 110, 114.) Resuscitation efforts were unsuccessful, (R. at 102-03, 107, 110), and Sorrells was pronounced dead at Parkland Hospital, where he had been taken by the paramedics. (R. at 113, 129, 130.) The cause of death, according to the medical examiner, was cocaine abuse, cardiac hypertrophy, and coronary atherosclerosis associated with physical exertion, restraint, and blunt force injuries. (R. at 379, 384.)

ARGUMENT SUPPORTING ALLOWANCE OF THE WRIT

A. The Fifth Circuit, by Affirming the Denial of Petitioners' Motion for Summary Judgment Based on Qualified Immunity, Has Decided an Important Federal Question in a Way that Misapplies or Conflicts with Relevant Decisions of this Court.

1. The Fifth Circuit Failed to First Determine Whether Respondents Have Pleaded a Constitutional Violation at All and, if so, to Then Determine Whether Respondents Have Alleged at the Appropriate Level of Specificity that the Constitutional Right Was Clearly Established.

Public officials who act within the scope of their discretionary authority and in the course of their official responsibilities are entitled to the defense of qualified immunity, which shields them from suit as well as from liability for civil damages, where their conduct "'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"

Wilson v. Layne, 526 U.S. at 609 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). *See also Malley v. Briggs*, 475 U.S. 335 (1986); *Pierson v. Ray*, 386 U.S. 547 (1967).

In *Siegert v. Gilley*, 500 U.S. 226 (1991), this Court "clarif[ied] the analytical structure under which a claim of qualified immunity should be addressed." *Id.* at 231. The Court held that the first inquiry in the examination of a defendant's claim of qualified immunity is whether the plaintiff has alleged the violation of a clearly established constitutional right. *Id.* In making a determination of whether a plaintiff has asserted a "clearly established" constitutional right, the trial court must first determine "whether the plaintiff has asserted a violation of a constitutional right at all." *Id.* at 232.

In *Wilson*, this Court made clear the analytical steps set out earlier in *Siegert*. According to *Wilson*, the trial court must first determine whether the plaintiff has alleged the violation of a constitutional right at all. If the court determines that such a violation has been alleged, the court must then determine whether the right was clearly established at the time of the alleged violation. *Wilson*, 526 U.S. at 609. The Court most recently confirmed this procedure in *Saucier v. Katz*. In *Saucier*, the Court held:

> If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established.

Id. at 2156. The allegations in Plaintiffs' Original Complaint and Jury Demand ("Respondents' Complaint") fail to meet the foregoing standards.

The allegations against Petitioners contained in Respondents' Complaint are general, conclusory, vague, and lack detail as to what circumstances Respondents allege made Petitioners' actions unconstitutional or unreasonable. (App. at 42-59.) Further, Respondents' Complaint does not state specifically what conduct of each Petitioner allegedly violated Sorrells's or Respondents' constitutional rights. (*Id.*) Respondents' Complaint is therefore insufficient to overcome the specificity requirement. (*Id.*)

Respondents generally complain that the force used against Sorrells on September 17, 1998, by Petitioners violated Respondents' Fourth and Fourteenth Amendment rights. (App. at 57.) To recover for a constitutional claim of excessive force in the Fifth Circuit, Respondents must plead and prove that they and Sorrells suffered (1) an injury (2) which resulted directly and only from the use of force that was clearly excessive to the need and (3) the force used was objectively unreasonable. *Goodson v. City of Corpus Christi*, 202 F.3d 730, 740 (5th Cir. 2000) (citing *Williams v. Bramer*, 180 F.3d 699, 703 (5th Cir. 1999)). *See also Ikerd v. Blair*, 101 F.3d 430, 433-34 (5th Cir. 1996).

Respondents must allege facts that would show that no reasonable police officer could have misunderstood that, for each particular Petitioner, his actions violated clearly-established federal law, and that those actions were objectively unreasonable in light of the information each Petitioner possessed at the time. *See Saucier*, 121 S.Ct. at 2156; *Wilson*, 526 U.S. at 615. Respondents have

not pleaded facts that show how each Petitioner used force that was excessive to the need, that the excessive force was objectively unreasonable under the clearly-established law and the information they possessed, and that Respondents' injury resulted directly and only from the use of the objectively-unreasonable excessive force.

The injury for which Respondents seek damages is the death of Sorrells. (App. at 58.) They allege that Sorrells' death resulted from one type, or a combination of two or more types, of force allegedly used by the officers. (App. at 55-56.) Respondents do not, however, allege facts to establish that the death of Sorrells resulted directly and only from the use of force by Petitioners that was clearly excessive to the need. (*See* App. at 42-59.) Nor do they allege facts to show that the use of force was clearly excessive to the need and that it was objectively unreasonable under the circumstances. (*Id.*) Respondents have thus failed to allege a constitutional violation for excessive force under Fifth Circuit law.

Respondents also purportedly allege a claim against Petitioners for failure to protect Sorrells from the use of excessive force. (App. at 55-57.) Respondents' allegations on this claim fail also. Those allegations are conclusory, speculative, inflammatory, and fail to set forth sufficient facts as to what use of allegedly excessive force each Respondent observed and failed to protect Sorrells from. (*Id.*) Instead, Respondents allege, for example, that Petitioners "chose further to neither intervene to protect Mr. Sorrells nor to otherwise render aid," (*id.* at 55), and that those officers "[d]eclin[ed] to intervene – to 'protect' and 'serve' – when they witness fellow officers murdering and/or torturing a suspect. . . . " (*Id.* at 56.) Such conclusory allegations cannot support a failure-to-protect claim.

The Fifth Circuit's decision failed to address the requirement, as set forth in *Saucier*, *Wilson*, and *Siegert*, that Respondents must allege the violation of a clearly-established constitutional right. (App. at 1-11.) The entire treatment given to qualified immunity by the Fifth Circuit (other than the standard-of-review recitals regarding questions of law and *de novo* review) consists of one paragraph:

> To determine whether a government official is entitled to qualified immunity from liability under 42 U.S.C. § 1983, a two step analysis is undertaken. *Hayter v. Mt. Vernon*, 154 F.3d 269, 274 (5th Cir. 1998). The first step is to determine whether the plaintiff has alleged a violation of a clearly established constitutional right. *Hare v. City of Corinth, Miss.*, 135 F.3d 320, 325 (5th Cir. 1998). "The second prong of the qualified immunity test is better understood as two separate inquiries: whether the allegedly violated constitutional rights were *clearly established at the time of the incident*; and, if so, whether the conduct of the defendants was objectively unreasonable in the light of that then clearly established law." *Id.* at 326 (emphasis in original).

(App. at 5-6.) The Fifth Circuit's opinion, citing two cases from that court that were decided prior to *Saucier* and *Wilson* and that apparently do not follow the rule set down in *Siegert*, misstates the standard for analyzing a claim of qualified immunity. There is no discussion, much less a determination, as to whether Respondents have pleaded a violation of a constitutional right at all, and, if so, whether they have alleged, at the appropriate level of specificity, that the right was clearly established. (App. at 1-11.)

Likewise, the district court, in its order adopting the magistrate judge's findings and recommendation, did not address whether Respondents sufficiently pleaded the violation of a clearly-established constitutional right. (App. at 12-13.) And the magistrate judge, in his recommendation, did not apply the proper test for determining whether Respondents have alleged a violation of a clearly-established constitutional right at the appropriate level of specificity. (App. at 32-33.) As Petitioners have shown, such an analysis would have established that Respondents have failed to sufficiently plead a constitutional violation against Petitioners for excessive force or failure to protect.

2. The Fifth Circuit Failed to Consider the Objective-Reasonableness Prong of the Qualified-Immunity Analysis Separately from the Objective-Reasonableness Prong of the Excessive Force Claim.

In *Saucier v. Katz*, this Court held that the objective-reasonableness prong of a qualified-immunity analysis is separate from the objective-reasonableness prong of an excessive force claim. *Saucier*, 121 S.Ct. at 2157-59. *See also Anderson v. Creighton*, 483 U.S. at 642-44. The Court explained that an officer might make a reasonable mistake as to the facts confronting him in a use-of-force situation, which brings into play objective reasonableness in an excessive force analysis. *Saucier*, 121 S.Ct. at 2158. On the other hand, however, the officer "might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances." *Id.* That situation concerns objective reasonableness in the context of qualified immunity. *Id.*

The Fifth Circuit did not address the objective reasonableness of Petitioners' qualified-immunity defense, (App. at 1-11), nor did the district court in its order adopting the magistrate judge's recommendation. (App. at 12-13.) And while the magistrate judge did address it, he made the same error that the Ninth Circuit had made in *Saucier* – he combined the two reasonableness determinations. (App. at 33.) The magistrate judge stated that " 'the elements of plaintiffs' excessive force claim coincide in large part with the elements of defendants' qualified immunity defense.' An essential element in both is whether defendants' actions were objectively unreasonable under the circumstances." (*Id.* (citations omitted).)

Petitioners did not receive from the Fifth Circuit or the district court a proper analysis of their qualified-immunity defense as contemplated by the decisions of this Court. Such an analysis would establish that Petitioners' actions, for qualified-immunity purposes, were objectively reasonable.

CONCLUSION

This Petition for Writ of Certiorari should be granted, the Court should reverse the opinion and judgment of the Fifth Circuit Court of Appeals affirming the denial of Petitioners' motion for summary judgment based on qualified immunity, and the Court should render judgment

in favor of Petitioners on the basis of qualified immunity and dismiss with prejudice all claims against them.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-10610

ESTATE OF SHANE G. SORRELLS, Etc.; Et al., — Plaintiffs,

ESTATE OF SHANE G. SORRELLS, by and through its independent executrix Sheryl Thostenson; DANA FONTENOT, as next friend of Chandler Sorrells, a Minor; PAT SORRELLS; RITA SORRELLS, — Plaintiffs-Appellees-Appellants,

versus

CITY OF DALLAS; Et al., — Defendants,

CITY OF DALLAS, — Defendant-Appellee,

JOSEPH CUTRONA, Officer; WILLIAM READDY, Officer; STANLEY GRIFFIS, Sergeant, — Defendants-Appellants-Appellees.

Appeals from the United States District Court
for the Northern District of Texas

(99-CV-1185)

(Filed Jul. 10, 2002)

Before DAVIS, EMILIO M. GARZA, and STEWART, Circuit Judges.

PER CURIAM:*

Joseph Cutrona ("Cutrona"), William Readdy ("Readdy"), and Stanley Griffis ("Griffis") (collectively, the "Officers") appeal from the district court's denial of qualified and official immunity from the plaintiffs' § 1983 and state law claims. The Estate of Shane G. Sorrells and various statutory heirs of Shane G. Sorrells (collectively, the "Sorrells Family") cross-appeal from the grant of summary judgment in favor of the City of Dallas ("Dallas"). For the reasons set forth below, we AFFIRM.

FACTUAL AND PROCEDURAL HISTORY

In the Fall of 1998, Officers Cutrona and Readdy were dispatched to an apartment complex to investigate a report of indecent exposure. Upon their arrival, they witnessed Shane G. Sorrells ("Sorrells"), nude and masturbating in the front seat of his car. Cutrona and Readdy told the suspect to get out of his locked car, he failed to respond. The officers then called for backup. According to the Sorrells Family, Sorrells did not exhibit any violent behavior or attempt to flee. Nevertheless, Cutrona and Readdy decided to use Oleoresin Capsicum ("OC") spray[1] to force Sorrells out of his vehicle. Sorrells continued to

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[1] OC spray, also known as pepper spray or pepper mace, is a chemical agent made from hot pepper extracts. The active ingredient, capsicum, is an inflammatory agent. Exposure to OC Spray irritates the mucous membranes of the eyes, nose, throat, and lungs. It also causes dilation of the capillaries, which inhibits the ability to breathe.

masturbate and remained in his vehicle. Around this time, Sergeant Griffis arrived. Griffis used an ASP baton to break the passenger-side window of the car. Sorrells was injured by pieces of flying glass and began to bleed. Cutrona and Griffis then used more OC spray on Sorrells, but he refused to exit the vehicle. At this point, Cutrona unlocked the car and attempted to pull Sorrells from the vehicle. However, because Sorrells was sweating, Cutrona could not get a firm grasp on him. Cutrona and Readdy were eventually able to remove Sorrells from the car and get him to the ground. Shortly thereafter, three more officers arrived on the scene. A struggle ensued when the officers attempted to handcuff Sorrells. According to the Sorrells Family, and a civilian witness, one of the officers struck Sorrells "between 25 and 30 times" with a baton while another officer applied a Lateral Vascular Neck Restraint ("LVNR"),[2] which is used to subdue struggling individuals. Cutrona admits that he struck Sorrells twice on the right arm with a baton after he refused a verbal command to put his arm behind his back. However, Cutrona denies that he used the extent of force alleged by the Sorrells Family. Eventually, Sorrells either began to slowly walk away (according to the Sorrells Family) or to violently escape (according to the Officers). Readdy apprehended Sorrells and brought him to the ground by use of a LVNR. Cutrona, with the assistance of the newly-arrived officers, handcuffed Sorrells. At some point during this ordeal, Sorrells lost consciousness and stopped breathing.

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[2] An LVNR is a neck restraint involving a rear head lock and compression until conscious compliance or unconsciousness. The Sorrells Family maintains that the LVNR is essentially a chokehold. The Officers deny that a chokehold was used on Sorrells.

Paramedics administered CPR at the scene and transported Sorrells to Parkland Memorial Hospital. Despite efforts to revive him, he was pronounced dead upon arrival. An autopsy revealed that Sorrells suffered a crushed larynx. The coroner ruled his death a homicide.

The Sorrells Family filed suit against Dallas, the Officers, and several other individuals including certain supervisory officials and the on-scene paramedics. They alleged excessive force and failure-to-protect violations pursuant to 42 U.S.C. §§ 1983 and 1985, and various state law causes of action, including violations of the Texas Tort Claims Act, assault, battery, false imprisonment, intentional infliction of emotional distress, and negligence. The defendants moved for summary judgment on all of the claims. The relevant arguments were that (1) the Officers were entitled to qualified and official immunity and (2) there was no basis for municipal liability against Dallas. The magistrate judge recommended that the motion for summary judgment be denied as to the claims of excessive force, failure-to-protect, and state law causes of action against the Officers, and be granted in favor of Dallas and the other individual defendants. The district court adopted the magistrate judge's findings and recommendation. The Officers appeal from the denial of qualified and official immunity. The Sorrells Family cross-appeals from the grant of summary judgment in favor of Dallas.

STANDARD OF REVIEW

A grant of summary judgment is reviewed *de novo*. *Price v. Roark*, 256 F.3d 364, 368 (5th Cir. 2001). A denial of a motion for summary judgment based on a claim of qualified immunity is also reviewed *de novo*. *Blackwell v.*

Barton, 134 F.3d 298, 301 (5th Cir. 1994). The issue of whether a right is clearly established is typically treated as a question of law. *Pfannstiel v. City of Marion*, 918 F.2d 1178, 1183 (5th Cir. 1990). Likewise, the question of the objective reasonableness of the Officers' conduct is also a question of law. *Mangieri v. Clifton*, 29 F.3d 1012, 1015-16 (5th Cir. 1994). Questions of law are reviewed *de novo*. *United States v. Urias-Escobar*, 281 F.3d 165, 166 (5th Cir. 2002). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

DISCUSSION

There are three main issues on appeal. First, whether the district court erred in failing to grant the Officers qualified immunity from the excessive force and failure to protect claims under § 1983. Second, whether the Officers are entitled to official immunity on the state law claims. Finally, whether the district court erred in granting summary judgment to Dallas based on its finding that no city policy or custom caused Sorrells's injury.

I. Qualified Immunity

To determine whether a government official is entitled to qualified immunity from liability under 42 U.S.C. § 1983, a two step analysis is undertaken. *Hayter v. Mt. Vernon*, 154 F.3d 269, 274 (5th Cir. 1998). The first step is to determine whether the plaintiff has alleged a violation

of a clearly established constitutional right. *Hare v. City of Corinth, Miss.*, 135 F.3d 320, 325 (5th Cir. 1998). "The second prong of the qualified immunity test is better understood as two separate inquiries: whether the allegedly violated constitutional rights were *clearly established at the time of the incident*; and, if so, whether the conduct of the defendants was objectively unreasonable in the light of that then clearly established law." *Id.* at 326 (emphasis in original).

Excessive force claims are analyzed under the rubric of the Fourth Amendment. *Johnson v. Morel*, 876 F.2d 477, 479 (5th Cir. 1989). At the time of the incident, a plaintiff wishing to establish an excessive force claim had to show that: (1) he suffered a significant injury, (2) resulting directly and only from the use of force that was clearly excessive to the need, and (3) the force used was objectively unreasonable. *Id.* at 480. A court must view the totality of circumstances from the standpoint of a reasonable officer on the scene, paying particular attention to "whether the suspect pose[d] an immediate threat to the safety of the officers or others." *Stroik v. Ponseti*, 35 F.3d 155, 158 (5th Cir. 1994).

The failure to protect a suspect from the use of excessive force by others can give rise to liability under § 1983. *Hale v. Townley*, 45 F.3d 914, 919 (5th Cir. 1995).

The district court correctly concluded that a genuine issue of material fact existed as to whether the Officers used excessive force and failed to protect Sorrells from the use of excessive force by their comrades. The Sorrells Family adduced considerable evidence controverting the Officers' version of the events. Specifically, there is evidence in the record supporting the view that Sorrells was

not a threat to anyone. First, Police Detective Joe Decorte admitted this fact to members of the Sorrells Family. Further, civilian witnesses testified that the Officers continued to kick and hit Sorrells after he was immobilized and that Sorrells did not resist or fight back. These witnesses further explained that Sorrells was repeatedly struck despite the fact that he was not struggling or fighting. Moreover, there is civilian witness testimony in the record verifying that Sorrells merely stumbled off, and did not try to flee, negating the notion that force was needed to limit the risk of flight. This witness also testified that Readdy leapt onto Sorrell's back and was choking him as Sorrells "tiptoed" away. While the Officers vigorously dispute the account of the incident as portrayed by the civilian witnesses and the Sorrells Family, the district court correctly concluded that there are too many disputed facts regarding the amount of force used, and the necessity of the escalating violence, to permit resolution of this case by way of summary judgment. Moreover, the same facts that give rise to a genuine issue of material fact as to whether the Officers used excessive force, give rise to a genuine issue of material fact as to whether the Officers failed to protect Sorrells.

II. Immunity from the State Law Claims

The Officers assert two separate grounds of immunity from the Sorrells Family's state law claims.

A. Official Immunity

"Texas' law of qualified or official immunity is substantially the same as federal immunity law." *Cantu v. Rocha,* 77 F.3d 795, 809 (5th Cir. 1996) (citing *City of*

Lancaster v. Chambers, 883 S.W.2d 650, 656 (Tex. 1994)). "There is, however, one important difference. Summary judgment is not appropriate, as it is in the federal system, simply on a showing that the right alleged to have been violated was not clearly established." *Id.* at 808-09 (citing *City of Lancaster,* 833 S.W.2d at 657). Texas's test for official immunity focuses solely on the objective legal reasonableness of the officer's conduct. *Id.* (citing *City of Lancaster,* 833 S.W.2d at 656-57).

We agree with the district court that the same fact issues that preclude summary judgment on the § 1983 claim, preclude granting official immunity on the state law claims.

B. Immunity Under Section 101.106 of the Texas Civil Practice and Remedies Code

The Officers also assert that they are entitled to immunity based on section 101.106 of the Texas Civil Practice and Remedies Code. That section provides that "[a] judgment in an action or a settlement of a claim under this chapter bars any action involving the same subject matter by the claimant against the employee of the governmental unit whose act or omission gave rise to the claim." TEX. CIV. PRACTICE MANAGEMENT & REM. CODE ANN. § 101.106 (Vernon 1997). The Texas Supreme Court has held that the immunity conveyed to a governmental unit's employees by section 101.106 is triggered by any judgment *in a Texas Tort Claim suit* against a governmental unit. *Newman v. Oberstellar,* 960 S.W.2d 621, 622-23 (Tex. 1997) (emphasis added). The cause of action against the employee need not arise under the Texas Tort Claims Act ("TTCA"). *White v. Annis,* 864 S.W.2d 127, 131 (Tex.

App. 1993) ("If the Legislature had intended for a judgment in a Tort Claims Act case to bar only actions against the employee based on the same cause of action, it would have written the statute to so provide."). The "same subject matter" language in section 101.106 means "arising out of the same actions, transactions, or occurrences." *Dallas County Mental Health & Mental Retardation v. Bossley,* 968 S.W.2d 339, 344 (Tex. 1998).

The Sorrells Family's state law claims against Dallas were not claims "under this chapter," i.e., the TTCA, because Dallas was only sued under § 1983. *Bell v. Love,* 923 S.W.2d 229, 231 (Tex. App. 1996) (recognizing that section 101.106 would only apply if the claims against the governmental unit were under the TTCA); *see also Thomas v. Oldham,* 895 S.W.2d 352, 355, 357 (Tex. 1995) (referring to "this chapter" as the TTCA). Because the judgment in favor of Dallas was based on § 1983, Texas's tort immunity does not apply.

III. Municipal Liability

"A municipality is liable under § 1983 for a deprivation of rights protected by the Constitution or federal laws that is inflicted pursuant to official policy." *Bennett v. City of Slidell,* 735 F.2d 861, 862 (5th Cir. 1984). An official policy is defined as (1) "[a] policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority" or (2) "[a] persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that

fairly represents municipal policy." *Id.* With regard to the second type of official policy, "actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority." *Id.*

When the challenged conduct relates to informal policies or a custom of behavior, a single violation is not actionable. *City of Okla. v. Tuttle,* 471 U.S. 808, 821 (1985) ("To impose liability [because of a single incident] would be to impose [liability] simply because the municipality hired one 'bad apple.'"). A plaintiff must establish "a pattern of similar incidents in which citizens were injured or endangered by intentional or negligent police misconduct and/or that serious incompetence or misbehavior was general or widespread," *Languirand v. Hayden,* 717 F.2d 220, 227-28 (5th Cir. 1983).

The Sorrells Family argues that the district court improperly granted summary judgment in favor of Dallas. They maintain that the policymaker for the City of Dallas is the Chief of Police. They assert that in this case, Chief of Police Bolton ("Bolton"), following an Internal Affairs investigation, exonerated all of the Officers, with the exception of Griffis. Therefore, they conclude that Bolton made a determination, as Dallas's policymaker, that the Officers acted within Dallas's formal written policies and procedures. They argue that either this proves that Dallas has a policy allowing for the use of excessive force or, alternatively, that this proves that Dallas's policymaker ratified the Officers' conduct. From this, they conclude that liability can be imposed on Dallas.

As the district court noted, however, this argument obscures the fact that the incident was single and isolated and that no policy causing Sorrell's injury has been shown. In fact, if anything, the Sorrells Family put forth evidence that Dallas has formal written policies designed to protect arrestees in these types of situations. Were we to hold Dallas liable in such a situation, we would be holding the city liable not for what its policy says, but for what Bolton interpreted that policy to require in a single-isolated incident. *See Monell v. N.W. City Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978) (holding that *respondeat superior* liability is unavailable in § 1983 suits). As such, the district court properly granted summary judgment in favor of Dallas on this claim.

CONCLUSION

For the reasons set forth above, we AFFIRM.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ESTATE OF SHANE G. SORRELLS, et al.	§	
Plaintiffs	§	CIVIL ACTION NO. 3:99-CV-1185-P
v.	§	
CITY OF DALLAS, et al.	§	
Defendants	§	

ORDER

(Filed Mar. 30, 2001)

After making an independent review of the pleadings, files and records in this case, and the Findings and Recommendation of the United States Magistrate Judge, I am of the opinion that the Findings and Conclusions of the Magistrate Judge are correct, except as described below.

The Court finds that the magistrate misstated the standard with respect to the use of excessive force in the fifth Circuit. The standard the Fifth Circuit has established is a three-part test. A plaintiff must show that: (1) he suffered a significant injury; (2) resulting from force that was clearly excessive to the need for force; and (3) the force used was objectively unreasonable. *Goodson v. City of Corpus Christi,* 202 F.3d 730, 740 (5th Cir. 2000).

The magistrate's reliance on *Gutierrez v. City of San Antonio,* 139 F.3d 441, 445 (5th Cir. 1998) is also misplaced since that case was specifically limited to situations involving a drug induced defendant, who had been hog-tied. The Defendants' reliance on *Wagner v. Bay City,* 227 F.3d 316 (5th Cir. 2000), is also inapplicable, however,

since *Wagner* involved an attempt by the officers to maintain control of a combative person resisting arrest. Here, a fact issue exists as to the amount of force used by the officers and the necessity of the force used while Sorrells was not offering resistance, according to the witnesses.

The use of the wrong standard and the reliance on *Gutierrez,* however, do not affect the outcome of this Court's decision.

Accordingly, the Findings and Recommendation of the magistrate court are hereby adopted as the Findings and Conclusions of the Court. Defendants' Objections are hereby **DENIED** and Plaintiffs' Objections are hereby **DENIED**.

So Ordered.

Signed this 30th day of March, 2001.

/s/ Jorge A. Solis
Jorge Solis
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ESTATE OF SHANE G. SORRELLS, ET AL.	§	
Plaintiffs,	§	NO. 3-99-CV-1185-P
VS.	§	
CITY OF DALLAS, ET AL.	§	
Defendants.	§	

FINDINGS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

(Filed Dec. 18, 2000)

Defendants City of Dallas, Joseph Cutrona, William Readdy, Stanley Griffis, Richard Hunt, Thomas Moore, Arnaldo Rivera, Bennie Click, Roland Gamez, and Joseph Vasquez have filed a motion for summary judgment in this civil rights case. The motion has been referred to United States Magistrate Judge Jeff Kaplan for recommendation pursuant to 28 U.S.C. § 636(b).

I.

The facts of this case are set forth at length in *Sorrells v. City of Dallas*, 192 F.R.D 203, 204-06 (N.D. Tex. 2000). Succinctly stated, Dallas police officers were dispatched to an apartment complex to investigate a report of indecent exposure on September 17, 1998. Upon their arrival, the officers witnessed a nude male masturbating in the front seat of his car. The suspect, later identified as Shane G. Sorrells, did not respond when told to exit his vehicle. At that point, the officers decided to use pepper mace to force

Sorrells out of his car. Sorrells appeared unaffected by the spray. The situation escalated when the offices forcibly removed Sorrells from the car and attempted to handcuff him. According to plaintiffs, one or more officers struck Sorrells repeatedly with a baton, kicked him, and maintained a chokehold for "five to eight minutes after he collapsed to the ground." Sorrells eventually lost consciousness and stopped breathing. Paramedics transported him to the hospital where he was pronounced dead.

The Sorrells family now sues various police officers, paramedics, supervisory officials, and the City of Dallas for civil rights violations under 42 U.S.C. §§ 1983 & 1985. They also assert state law claims for assault, battery, false imprisonment, intentional infliction of emotional distress, and negligence. Defendants move for summary judgment as to all claims and causes of action. The issues have been briefed by the parties and the motion is ripe for determination.

II.

Summary judgment is proper when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. FED.R.CIV.P.56(c); *Celotex Corp. v. Catrett*. 477 U.S. 317, 322, 106 S.Ct. 2548, 252, 91 L.Ed.2d 265 (1986). A dispute is "genuine" if the issue could be resolved in favor of either party. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct 1348, 1356, 89 L.Ed.2d 538 (1986); *Thurman v. Sears, Roebuck & Co.*, 952 F.2d 128, 131 (5th Cir.), *cert. denied*, 113 S.Ct 136 (1992). A fact is "material" if it might reasonably affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505,

2510, 91 L.Ed.2d 202 (1986); *Matter of Gleasman*, 933 F.2d 1277, 1281 (5th Cir. 1991).

A movant who does not have the burden of proof at trial must point to the absence of a genuine fact issue. *Duffy v. Leading Edge Products, Inc.*, 44 F.3d 308, 312 (5th Cir. 1995); *Tubacex, Inc. v. M/V Risan*, 45 F.3d 951, 954 (5th Cir. 1995). The burden then shifts to the non-movant to show that summary judgment is not proper. *Duckett v. City of Cedar Park*, 950 F.2d 272, 276 (5th Cir. 1992). The non-movant may satisfy this burden by tendering depositions, affidavits, and other competent evidence. *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir.), *cert. denied*, 113 S.Ct. 82 (1992). All evidence must be viewed in the light most favorable to the party opposing the motion. *Rosado v. Deters*, 5 F.3d 119, 122 (5th Cir. 1993); *Reid v. State Farm Mutual Automobile Insurance Co.*, 784 F.2d 577, 578 (5th Cir. 1986). However, conclusory statements and testimony based on conjecture or subjective belief are not competent summary judgment evidence. *Topalian*, 945 F.2d at 1131.

III.

Defendants seek summary judgment on five grounds: (1) plaintiffs cannot establish their federal constitutional claims for use of excessive force, failure to intervene, failure to render aid, conspiracy, and denial of the due process and equal protection; (2) the individual defendants are entitled to qualified immunity; (3) there is no basis for municipal liability against the City of Dallas; (4) the police and fire chiefs are not liable for the actions of their subordinates; and (5) defendants are immune from plaintiffs'

state law claims.[1] The Court will consider these issues in turn.

IV.

The gravamen of plaintiffs' complaint is that various police officers used excessive force against Shane G. Sorrells. Plaintiffs also assert claims under federal law for failure to intervene, failure to render aid, conspiracy, and denial of due process and equal protection.

A.

An excessive force claim is analyzed under the "reasonableness" standard of the Fourth Amendment to the United States Constitution. *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443 (1989); *Ikerd v. Blair*, 101 F.3d 430, 433 (5th Cir. 1996). The Fifth Circuit has established a three-part test in such cases. A plaintiff must show that: (1) he suffered a significant injury; (2) resulting from force that was clearly excessive to the need for force; and (3) the force used was objectively unreasonable. *Goodson v. City of Corpus Christi*, 200 F.3d 730, 740 (5th Cir. 2000). The Court must view the totality of circumstances from the standpoint of a reasonable

[1] Defendants also seek summary judgment on the grounds that the Dallas Police Department and Dallas Fire Department are not entities capable of being sued and that the City of Dallas is not liable for punitive damages. In their response, plaintiffs point out that they have not sued the Dallas Police Department or Dallas Fire Department. (Plf. Brief at 22 n.21). The Court does not reach the issue of punitive damages because plaintiffs have failed to establish any of their claims against the City.

officer on the scene, paying particular attention to "whether the suspect pose[d] an immediate threat to the safety of the officers or others." *Stroik v. Ponseti*, 35 F.3d 155, 157-58 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 1692 (1995). *citing Graham*, 109 S.Ct at 1872.

The following facts are not in dispute. On September 17, 1998, Shane G. Sorrells parked his car behind an apartment complex at 3910 North Hall Street in Dallas, Texas. Sorrells isolated himself in the vehicle by locking the doors and rolling up the windows. Corporal Joseph Cutrona and Officer William Readdy were dispatched to the scene to investigate a report of indecent exposure. Upon their arrival, the officers observed Sorrells masturbating in the front seat of his car. The officers instructed Sorrells to exit the vehicle. Sorrells ignored their command and continued masturbating. The officers then called for backup. Before help arrived, Corporal Cutrona shot Oleoresin Capsicum ("OC") spray into the car.[2] Shortly thereafter, Sergeant Stanley Griffis arrived at the location. Sergeant Griffis borrowed an ASP baton from Officer Readdy and broke out the passenger side window of the car. Sorrells was cut by pieces of flying glass and began to bleed. Corporal Cutrona and Sergeant Griffis then used more OC spray on Sorrells, but he still refused to exit the vehicle. At that point, Corporal Cutrona unlocked the doors and attempted to pull Sorrells from the

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[2] Oleoresin Capsicum spray, also known as pepper spray or pepper mace, is a chemical agent made from hot pepper extracts. The active ingredient, capsicum, is an inflammatory agent. Exposure to OC spray irritates the mucous membranes of the eyes, nose, throat, and lungs. It also causes dilation of the capillaries, which inhibits the ability to breathe.

car. However, Sorrells was so slippery from sweat, blood and OC spray that the officer could not get a firm grasp on his wrist. Corporal Cutrona and Officer Readdy were eventually able to remove Sorrells from the car and get him to the ground.

A struggle ensued when the officers tried to handcuff the suspect. Sorrells resisted and attempted to leave the scene. Officer Readdy caught Sorrells after a brief chase and brought him down by using a Lateral Vascular Neck Restraint ("LVNR") hold.[3] Other officers stuck Sorrells with their batons in an attempt to bring him under control. At some point during this ordeal, Sorrells lost consciousness and stopped breathing. Paramedics administered CPR on the scene and transported Sorrells to Parkland Memorial Hospital. Despite efforts to revive him, Sorrells was pronounced dead on arrival. An autopsy revealed that Sorrells sustained a fractured larynx. The coroner initially ruled his death a homicide.

Defendants contend that their actions were objectively reasonable under the circumstances and therefore did not rise to the level of excessive force. In an affidavit prepared immediately following the incident, Sergeant Griffis stated that he decided to break out the car window and arrest Sorrells because "[w]ith the car running, I felt that the

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[3] A Lateral Vascular Neck Restraint, or LVNR hold, is one method used by police officers to restrain a resisting suspect. The three levels of LVNR that may be employed are: (1) a rear headlock; (2) compression until compliance is achieved; and (3) compression until the suspect is unconscious. DPD SPECIAL ORDER 97-05, § 903.01 (1997). An LVNR hold is considered safer than a bar-arm hold because it restricts only flow to the brain, rather than the suspect's ability to breathe. (Plf. App. at 146, 184-85, 277-78).

suspect could possibly put the car in gear. If he did that, he would have endangered himself, us, and any citizens in his path." (Plf. App. at 189). Sergeant Giffis did not consider covering the windshield with a blanket and "simply waiting [the suspect] out" because Sorrells might have had a weapon in the car. (*Id.* at 226).

Defendants also attempt to justify striking Sorrells with their batons and placing him in a neck hold. Sergeant Griffis stated that the suspect continued to masturbate even after he was forcibly removed from the vehicle. Corporal Cutrona and Officer Readdy were unable to get control of the suspect, who was covered with OC spray and blood. Sergeant Griffis described Sorrells as "super strong, as if high on something." (*Id.* at 201). After Sorrells refused to comply with repeated verbal commands, Corporal Cutrona began striking him on the elbows and legs with an ASP baton. Sorrells was unfazed by the blows and continued to resist. (*Id.*).[4] He eventually jumped to his feet, spit in Corporal Cutrona's face, and ran away. (Def. App. at 5, 11, 17). Sorrells ran into an apartment complex between two parked cars. (*Id.* at 12). When confronted by the officers, Sorrells "continued to aggressively run at us and thrash his arms towards us." (*Id.* at 17). Corporal Cutrona struck Sorrells on the leg with his baton, but he continued to ignore orders to place his hands behind his back. Officer Readdy then placed a LVNR hold on the suspect. (*Id.*).

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[4] According to Corporal Cutrona, Sorrells responded to blows by stating "[t]hat feels good: f— me up the a—." (Def. App. at 11).

According to defendants, Sorrells continued to struggle after Officer Readdy applied the neck hold. (*Id.* at 12, 17-18, 21, 25). Corporal Cutrona tried to protect himself by striking Sorrells in the leg "several times" with his baton. (*Id.* at 12). He then noticed that "[d]ecedent's eyes start[ed] to close and his face beg[an] to slightly discolor." (*Id.*). Officer Readdy released the hold when Sorrells went to the ground. Still the officers were unable to get Sorrells on his stomach so they could immobilize his arms. After struggling with the suspect for more than 15 minutes, Corporal Cutrona had almost no energy left. He explained:

> All I could think to do was to get on Decedent's back to prevent him from standing up and continuing to fight us. I got on his back while ordering him to stay on the ground. My right foot was on his right shoulder area, near the middle of his back, and my left foot was on his mid-back. I was trying to stand and balance myself, even though I could feel that Decedent was still trying to get up. If he was saying anything our commands drowned it out but he was definitely conscious and still resisting our attempts to handcuff him.

(*Id.* at 12-13). Corporal Cutrona, assisted by Officers Thomas Moore and Richard Hunt, eventually subdued and handcuffed the suspect. (*Id.* at 6, 13, 18, 21, 25). Several officers went to get treatment for their exposure to OC spray. After they left, Officer Hunt noticed that Sorrells had lost consciousness and stopped breathing. (*Id.* at 7, 13, 18, 21, 25, 28).

Plaintiffs have adduced considerable evidence to controvert defendants' version of the facts surrounding this incident. For example, Corporal Cutrona testified in his deposition that Sorrells' car was parked facing the

patio of the apartment complex. (Plf. App. at 129). Officer Readdy parked his squad car directly behind Sorrells. (*Id.*). Thus, the officers effectively prevented Sorrells from moving his vehicle. This controverts Sergeant Griffis' contention that immediate action was required to minimize the risk of harm to officers and onlookers if Sorrells put his car in gear. Moreover, there is evidence in the record to suggest that Sorrells was not a threat to anyone. Dallas Police Detective Joe DeCorte admitted as much to members of the Sorrells family. (*Id.* at 440-41). It is therefore questionable whether the officers were justified in using OC spray to remove Sorrells from his car.[5]

There also is evidence that officers continued to strike and kick Sorrells after he was on the ground. One witness, Susan Oakey, observed an officer strike Sorrells with his baton. Sorrells was "very preoccupied and appeared to be unable to ward off the blows." (*Id.* at 385). Oakey saw the same officer kick Sorrells several times after he rolled over into a fetal position. At no time did Sorrells offer any resistance. (*Id.* at 386). Another witness, Robert Adelsberger, described the ferocity of the blows administered to Sorrells after officers removed him from his car:

> One of the officers who was approximately 6' - 6'1" tall started kicking the man. The other officer who was short, stocky, bald and had a mustache started beating the man with a baton. He was hitting him with side strokes and overhead

[5] Dallas Police Department Special Order No. 97-05 provides, in relevant part, that "OC [s]pray will not be used on subjects who are using techniques of non-cooperation and those not posing a physical threat to anyone." (Plf. App. at 43).

> strokes of the baton. At one point, he was bringing the baton back over his head and coming straight down on the man like he had an "axe handle." The officer hit him repeatedly, maybe 25-30 times, and to the point that the officer was breathing heavily and red in the face.

(*Id.* at 356). Adelsberger further stated that Sorrells, who was completely nude and barefooted, merely "tip-to[ed]" down a parking lot filled with rocks and debris. (*Id.* at 356). Oakey testified that Sorrells "stumble[d] off." (*Id.* at 384). This controverts the officers' testimony that Sorrells attempted to flee the scene. Even Corporal Cutrona conceded that Sorrells was not running at such a fast pace that it was hard to keep up with him. (*Id.* at 143). Officer Readdy described the pace as something less than a sprint. (*Id.* at 182). Sergeant Griffis said that Sorrells "wasn't trying to outrun us, at least in my appearance [sic]." (*Id.* at 230).

Finally, the facts and circumstances surrounding the chokehold used on Sorrells are in dispute. Corporal Cutrona admitted that he cornered the suspect between two cars and a fence. (*Id.* at 104, 123). This effectively negated any risk of flight. While Officer Readdy applied the LVNR hold, Corporal Cutrona continued to hit Sorrells with a baton. (*Id.* at 123). There is at least some evidence that Sorrells was not fighting or struggling with officers at the time. (*Id.* at 382). One witness said that the neck hold applied by Officer Readdy was so forceful that "[t]he officer was literally being carried by [Sorrells] due to the 'choke hold' and the officer's feet being off of the ground." (*Id.* at

356). There is sufficient evidence in the record to suggest that these actions might be contrary to police department policy.[6]

Defendants cite *Wagner v. Bay City, Texas*, 227 F.3d 316 (5th Cir. 2000), for the proposition that the conduct of the police officers was not objectively unreasonable as a matter of law. *Wagner* also involved the death of a suspect while in police custody. In that case, the police were called to break up a fight at a fast-food restaurant. The suspect resisted the officers and was sprayed with pepper mace. Next, the officers handcuffed the suspect and placed him face-down on the pavement. There was conflicting evidence as to whether the suspect continued to struggle after that point. In any event, one of the officers placed his knee on the suspect's back and "kept pushing [his] neck and head to the ground" with a stick. Sometime during this ordeal the suspect passed out. Rather than take him to the hospital, the officers decided to transport the suspect to jail. He was carried to a squad car and placed on his stomach with his head turned toward the front of the vehicle. No one monitored his condition. When the suspect arrived at the jail, the officers realized that he was not breathing. CPR was administered and the suspect was taken to the hospital where he later died. *Id.* at 318-19.

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[6] Dallas Police Department Special Order No. 97-05 provides, in relevant part, that "[t]he LVNR will not be used on subjects who are using techniques of non-cooperation and not posing a physical threat to anyone." (Plf. App. at 44). In addition, the LVNR should only be used in "exigent circumstances" if the subject has been sprayed with Oleoresin Capsicum. (*Id.*).

The district court determined that there were genuine issues of material fact as to whether the amount of force used against the suspect was objectively unreasonable. The Fifth Circuit disagreed. The court concluded that "nothing about the use of chemical spray or even a chokehold was objectively unreasonable conduct where the suspect physically resisted arrest. The officers' actions were all consistent with the idea that they merely were trying to restrain a violent individual." *Id.* at 324, *citing Estate of Phillips v. Milwaukee*, 123 F.3d 586, 593-94 (7th Cir. 1997). Thus, the court held that defendants were entitled to summary judgment on plaintiffs' excessive force claim.

The Court acknowledges *Wagner* but determines that the facts of this case are more analogous to *Gutierrez v. City of San Antonio*, 139 F.3d 441, 445 (5th Cir. 1998). In *Gutierrez*, the police confronted a suspect who appeared to be "high on some type of drugs." The suspect came toward the officers swinging his arms wildly and shouted that he had been shot. Although the suspect had numerous abrasions, no bullet wounds were found. The officers handcuffed the suspect "for his safety and mine." The situation escalated when paramedics attempted to transport the suspect to the hospital. At that point, the suspect began to push and kick one of the paramedics. The officers then decided to "hog-tie" the suspect and transport him in a squad car. It is not clear whether the suspect was placed in a face-down position in the rear seat or with his face pointed toward the rear of the front seat. In any event, he was conscious and struggling when the officers set off for the hospital. Approximately ten minutes later, the suspect stopped struggling. He was unconscious by the time he arrived at the hospital. Medical personnel could not find a

pulse and the suspect was later pronounced dead by an emergency room doctor. *Id.* at 443.

On those facts, the Fifth Circuit held that summary judgment was not proper on plaintiffs' excessive force claim. The court based its decision, in part, on a well-circulated report issued by the San Diego Police Department on the dangers of Sudden Custody Death Syndrome ("SCDS"). That report concluded that SCDS could be caused by a combination of: (1) drug use; (2) positional asphyxia; (3) cocaine psychosis; and (4) hog-tying or carotid choke holds. Because there was conflicting evidence as to whether these conditions existed, the court held that it was impossible to determine whether the officers' actions were objectively reasonable under the circumstances. *Id.* at 446.

Similar considerations preclude summary judgment in favor of Sergeant Griffis. Corporal Cutrona, and Officer Readdy. The evidence shows that at least one officer believed Sorrells was "high on something." (Plf. App. at 201).[7] He was handcuffed and placed face-down on the ground while Corporal Cutrona stood on his back "to prevent him from standing up . . . " (Def. App. at 12). Although Sorrells was not hog-tied, he was placed in an LVNR or carotid neck hold until his face turned red. (Plf. App. at 382). Among the factors that contributed to his death were cocaine abuse, restraint, and blunt force injuries. (*Id.* at 94-95). These facts are more akin to

[7] Toxicology reports confirmed that Sorrells ingested a large amount of cocaine, which also may explain his aberrant behavior. (Plf. App. at 89).

Gutierrez than *Wagner*. Moreover, there is conflicting evidence regarding the amount of resistance offered by Sorrells and whether he presented a danger to the officers or others. A jury must resolve these conflicts in order to determine whether the level of force used was clearly excessive and objectively unreasonable under the circumstances.[8]

The Court reaches a different conclusion with respect to Officers Hunt, Moore, and Rivera. The evidence shows that these officers arrived on the scene after Sorrells had been taken down by Officer Readdy. (*Id.* at 239, 247, 252, 257, 266, 268-70). Although there is conflicting evidence as to the resistance offered by the suspect up to that point, there is no dispute that Sorrells struggled when the officers tried to place handcuffs on him. (*Id.* at 104-05, 110-11, 160, 202, 239, 247, 253, 257, 266, 268-70, 343, 356-57, 360, 371). Moreover, Officers Hunt, Moore, and Rivera merely forced Sorrells onto his stomach so he could be restrained. The use of physical force to secure compliance from a suspect who resists arrest is not objectively unreasonable. *See Sappington v. Bartee*, 195 F.3d 234, 237 (5th Cir. 1999) (officer justified in using force to arrest uncooperative suspect); *Colston v. Colston*, 130 F.3d 96, 100 (5th Cir. 1997) (use of force objectively reasonable when suspect poses danger to arresting officer). Accordingly, these officers are entitled to summary judgment.

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[8] Sergeant Griffis is not insulated from liability merely because he did not personally strike Sorrells with a baton or apply a chokehold. The evidence shows that Sergeant Griffis used an entire canister of OC spray on Sorrells, which hampered his breathing and may have contributed to his death. (Plf. App. at 189, 428-39).

B.

The failure to protect a suspect from the use of excessive force by others may give rise to liability under 42 U.S.C. § 1983, *See Hale v. Townley*, 45 F.3d 914, 919 (5th Cir. 1995); *Harris v. Chancelor*, 537 F.2d 203, 205-06 (5th Cir. 1976). As discussed above, there is sufficient evidence to preclude summary judgment in favor of Sergeant Griffis, Corporal Cutrona, and Officer Readdy as to this claim. All three officers were present when Sorrells was subjected to the use of force. None intervened to protect him. However, Officers Hunt, Moore, and Rivera did not arrive on the scene until after Sorrells had been sprayed, beaten, kicked, and taken down with an LVNR hold. These officers are entitled to summary judgment as to this claim.

C.

Plaintiffs also contend that the police officers and paramedics failed to render medical aid to Sorrells. This claim is governed by the "deliberate indifference" standard of the Eighth Amendment to the United States Constitution. U.S. CONST. amend. VIII; *Estelle v. Gamble*, 429 U.S. 97, 105, 97 S.Ct 285, 292 50 L.Ed.2d 251 (1976). Plaintiffs must show that the police officers were aware of a substantial risk of serious harm and failed to take reasonable measures to abate that risk. *Hare v. City of Corinth*, 74 F.3d 633, 649 (5th Cir. 1996), *citing Farmer v. Brennan*, 511 U.S. 825, 847, 114 S.Ct. 1970, 1984 128 L.Ed.2d 811 (1994).

The summary judgment evidence shows that two paramedics arrived on the scene at the same time as Officers Hunt and Moore. Before he was handcuffed, Sorrells stated he could not breathe. (Plf. App. at 339, 342,

345). One of the paramedics attributed the comment to his struggle with police officers. (*Id.* at 339). When the other paramedic approached the suspect, Sorrells "cussed" and spit at him (*Id.* at 242, 281, 346, 349). Corporal Cutrona and Officer Readdy went to the ambulance to receive treatment for their exposure to OC spray. (*Id.* at 105, 111, 158, 170). At that point, Sorrells was still breathing and muttering, (*Id.* at 105, 111, 158, 163, 170) Officer Hunt then yelled that Sorrells had stopped breathing. (*Id.* at 105, 111, 158, 170, 198, 224, 242-43, 249, 340, 346). Prior to that time, Sorrells' color had returned to normal. (*Id.* at 106, 111)

Defendants contend that the paramedics immediately responded to Officer Hunt's outcry and began to administer CPR. (*Id.* at 105, 111, 158, 170, 198, 224, 242-43, 249, 340, 346). Plaintiffs disagree. They claim that one of the paramedics looked at Sorrell, but "went back to the ambulance in an unconcerned manner." (Plf. Brief at 19). According to plaintiffs, neither paramedic made physical contact with Sorrells or attempted CPR "until nearly ten minutes after Officer Readdy released the choke-hold and only when Mr. Sorrells' condition became so severe that his skin turned blue." (*Id.*).

These discrepancies can be easily reconciled. Although Officer Moore did say that one of the paramedics knelt down over Sorrells "but then went back to the ambulance in and unconcerned manner," there is no evidence that Sorrells was in distress at the time. (Plf. App. at 270). To the contrary, the evidence shows that paramedics started CPR within *one minute* after Sorrells went quiet and stopped breathing. (*Id.* at 270, 285). Plaintiffs have failed to adduce any evidence that the police officers and paramedics on the scene failed to render appropriate medical

treatment to Sorrells or were deliberately indifferent to his medical needs. Defendants are entitled to summary judgment as to this claim.

D.

Plaintiffs further allege that defendants conspired to deprive Sorrells and his family of their civil rights "[a]s a result of their concerted and malicious treatment of Mr. Sorrells . . . " (Plf. Compl. ¶ 4.07). Defendants correctly point out that such vague and conclusory allegations will not defeat a motion for summary judgment. *See Young v. Biggers*, 917 F.2d 873, 877 (5th Cir. 1990); *Lynch v. Cannatella*, 810 F.2d 1363, 1369-70 (5th Cir. 1987). In an attempt to salvage their conspiracy claim, plaintiffs now contend that "[t]he investigation that took place *after* [Sorrells'] death was such a sham as to constitute no investigation at all and DPD's conduct in choosing to attack his public reputation rather than . . . interviewing civilian witnesses to his death, demonstrates a conspiracy among the officers, DPD, and Dallas." (Plf. Brief at 20) (emphasis added).

The Court need not decide whether an actionable conspiracy exists when police officers conceal important facts about a crime from its victims. *But see Vasquez v.. Hernandez*, 60 F.3d 325, 328 (7th Cir. 1995), *cert. denied*, 116 S.Ct 1545 (1996) (holding that such a conspiracy is actionable under section 1985). This theory, raised for the first time in response to defendants' motion for summary judgment, is not alleged anywhere in the complaint. Accordingly, the conspiracy claim fails as a matter of law. *See Romero v. Alexander Chemical Employee Health Care Plan*, 1999 WL 498638 at *5 n.4 (N.D. Ill. July 2, 1999)

(plaintiff may not raise issue for first time in response to summary judgment motion); *Nelson v. United States*, 1994 WL 247214 at *5 (E.D. Mich. Mar. 30, 1994) (defense waived when asserted in response to motion for summary judgment); *Ovitz v. Jefferies & Co., Inc.*, 102 F.R.D. 242 243 (N.D. Ill. 1984) (response to motion for summary judgment not sufficient to put theory of recovery in issue).

E.

Plaintiffs generally allege violations of their due process and equal protection rights. (Plf. Compl. ¶¶ 4.03-4.04). Defendants contend that these claims are duplicative of other claims raised in the pleadings and should be dismissed for that reason. Plaintiffs wholly fail to address this argument in their response.[9] Accordingly, defendants are entitled to summary judgment.

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[9] The closest plaintiffs come to articulating a due process claim is their argument that Sorrells was not provided adequate medical care as a pretrial detainee. (Plf. Response at 19). Although such a claim may arise under the due process clause, it is properly analyzed under the "deliberate indifference" standard of the Eighth Amendment. *See Hare*, 74 F.3d at 649. The Court has previously determined that defendants were not deliberately indifferent to Sorrells' medical needs.

Plaintiffs' equal protection argument is also flawed. In order to establish an equal protection violation, plaintiffs must show that: (1) a state actor intentionally discriminated against Sorrells because of his membership in a protected class; (2) defendants were motivated by animus or ill-will; and (3) no rational basis existed for the disparate treatment *See Village of Willlowbrook v. Olech*, 528 U.S. 562, ___, 120 S.Ct 1073, 1074-75, 145 L.Ed.2d 1060 (2000). Here plaintiffs fail to satisfy any element of this test. There is absolutely no evidence that Sorrells belonged to a protected class, that he was treated differently than others similarly situated, or that defendants were motivated by animus or ill-will towards him.

F.

The individual defendants also seek summary judgment on their qualified immunity defense. Police officers are entitled to qualified immunity if their conduct does not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Gutierrez*, 139 F.3d at 445, *citing Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). The Supreme Court has clarified the analytical structure under which a claim of qualified immunity should be addressed. *Siegert v. Gilley*, 500 U.S. 226, 231-33, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991). First, the court must determine whether the plaintiff has alleged the deprivation of an actual constitutional right. *Wilson v. Layne*, 526 U.S. 603, 119 S.Ct. 1692, 1697, 143 L.Ed.2d 818 (1999); *Siegert*, 111 S.Ct. at 1793. If the plaintiff alleges a constitutional deprivation, the court must then decide whether that right was clearly established at the time of the alleged violation and whether the conduct of the police officer was objectively unreasonable under the circumstances. *Id.* at 1789. A constitutional right is clearly established if "the contours of that right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). The second prong of this inquiry necessarily depends on the unique circumstances of each case. *Id.*. However, the subjective intent of the police officer is irrelevant. *Id.*

The Court has previously determined that plaintiffs have alleged an excessive force claim against Sergeant Griffis, Corporal Cutrona, and Officer Readdy. There is no question that this is a "clearly established" constitutional

right. *See Gutierrez*, 139 F.3d at 446, *citing Tennessee v. Garner*, 471 U.S. 1, 11, 105 S.Ct. 1694, 1701, 85 L.Ed.2d 1 (1985) (use of deadly force violates Fourteen Amendment unless officer has probable cause to believe that suspect poses threat of serious physical harm). Thus, the only question is whether the conduct of these officers was objectively unreasonable under the circumstances.

As noted by the Court in an earlier opinion, "the elements of plaintiffs' excessive force claim coincide in large part with the element of defendants' qualified immunity defense." *Sorrells*, 192 F.R.D. at 209, *citing Heitschmidt v. City of Houston*, 161 F.3d 834, 839 (5th Cir. 1998). An essential element in both is whether defendants' actions were objectively unreasonable under the circumstances. *See Anderson*, 107 S.Ct. at 3038-39 (qualified immunity); *Johnson v. Morel*, 876 F.2d 477, 480 (5th Cir. 1989) (excessive force). There are simply too many disputed facts to permit resolution of this issue by way of summary judgment. That is not to say defendants are not entitled to qualified immunity. The issue will have to be resolved at trial. *See Roberts v. Marino*, 656 F.2d 1112, 1114 (5th Cir. 1981) (jury required when evidence amounts to "outright swearing match" between parties).

V.

The City of Dallas argues that plaintiffs have failed to establish any basis for municipal liability under 42 U.S.C. § 1983. Specifically, the City maintains that plaintiffs have failed to identify an official policy or custom which resulted in a constitutional injury.

A.

A municipality is not liable for the constitutional torts of its employees under the theory of *respondeat superior*. *Monell v. Department of Social Services of New York*, 436 U.S. 558, 690-94, 98 S.Ct. 2018, 2035-37, 56 L.Ed.2d 611 (1978); *Benavides v. County of Wilson*, 955 F.2d 968, 972 (5th Cir.), *cert. denied*, 113 S.Ct. 79 (1992). However, liability may be imposed under 42 U.S.C. § 1983 where an official policy, custom, or practice results in the deprivation of a federally protected right. *Monell*, 98 S.Ct. at 2037-38. A plaintiff must show that: (1) the policy was inadequate; (2) the policymakers were deliberately indifferent to the constitutional rights of its citizens; and (3) the policy directly caused the injury. *City of Canton v. Harris*, 489 U.S. 378, 390-92, 109 S.Ct. 1197, 1205-06, 103 L.Ed.2d 412 (1989); *Benavides*, 955 F.2d at 972. In cases where the course of action was deliberately chosen by a decisionmaker with final authority to establish municipal policy, a single act is sufficient to give rise to a civil rights violation. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-81, 106 S.Ct. 1292, 1299, 89 L.Ed.2d 452 (1986).

A different standard applies where the challenged conduct relates to informal policies or a custom of behavior among municipal employees. In such cases, a single constitutional violation is not actionable under section 1983. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 820-24, 105 S.Ct. 2427, 2434-36, 85 L.Ed.2d 791 (1985). A plaintiff must establish "a pattern of similar incidents in which citizens were injured or endangered by intentional or negligent [misconduct] or that serious incompetence or misbehavior was general or widespread . . . " *Languirand v. Hayden*, 717 F.2d 220, 227-28 (5th Cir. 1983), *cert. denied*, 104 S.Ct. 2656 (1984). The critical inquiry is

whether the governing body or official policymaker had actual or constructive knowledge of persistent and widespread violations of constitutional rights. *See Bennett v. City of Slidell*, 728 F.2d 762, 768 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 3476 (1985).

B.

Plaintiffs allege that the City of Dallas maintains a number of unconstitutional policies which lead to the death of Shane G. Sorrells. These include: (1) allowing the use of deadly force on non-threatening suspects who do not pose a flight risk; (2) sanctioning the use of deadly force against mentally impaired suspects who present no threat of immediate physical harm; (3) allowing suspects to be restrained in a prone position following the use of force; (4) failing to require supervisors to monitor suspects placed in such a position; (5) condoning the failure of police officers and emergency medical personnel to intervene and render aid following the improper use of force; (6) failing to adequately train police officers and paramedics; and (7) failing to investigate incidents involving the use of deadly force or discipline responsible parties. (Plf. Brief at 22).

Not surprisingly, plaintiffs do not identify any formal policy which they allege to be unconstitutional on these grounds. Instead, plaintiffs argue that the actions of police and fire officials *following this incident* create a fact issue as to actual City policy. Plaintiffs cite an investigation conducted by the Internal Affairs Division of the Dallas Police Department wherein investigators determined that only Corporal Cutrona and Sergeant Griffis violated

departmental policies.[10] (Plf. App. at 500, 523-44). Deputy Chief J.C. Martinez and Chief Terrell Bolton rejected the findings as to Sergeant Griffis. (*Id.* 558). As a result, only Corporal Cutrona was disciplined.[11] (*Id.* at 554-55). Plaintiffs further note that the Dallas Fire Department did not investigate the conduct of their paramedics. According to plaintiffs, the failure to conduct an adequate investigate [sic] or discipline the responsible parties suggests that the City tacitly approved of the conduct at issue in this case. (Plf. Brief at 23-24).

This circular argument obscures the fact that plaintiffs seek to impose liability on the City for actions taken by individual police officers and paramedics on the scene. Plaintiffs present no evidence of "a pattern of similar incidents" involving the use of deadly force on mentally impaired suspects or the failure to render appropriate medical care after such force is used. The single, isolated incident involving Sorrells is insufficient to show that an official policy or custom existed. As the Supreme Court has stated:

> Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy an be attributed to a municipal policymaker. . . . *But*

[10] The Internal Affairs investigator concluded that Corporal Cutrona "used unnecessary or inappropriate force" and that Sergeant Griffis "failed to appropriately engage in and control a police incident under this supervision." (Plf. App. at 500, 532-36).

[11] Corporal Cutrona was suspended without pay for one day. (Plf. App. at 554-44).

> *where the policy relied upon is not itself unconstitutional*, considerably more proof than the single incident will be necessary *in every case* to establish both the requisite fault on the part of the municipality, and the causal connection between the "policy" and the constitutional deprivation.

Tuttle, 105 S.Ct. at 2436 (emphasis added). Such is the case here. One incident of excessive force cannot sustain the inference that the City sanctioned or was indifferent to such constitutional abuses. *See Campbell v. City of San Antonio*, 42 F.3d 973, 977 (5th Cir. 1995) (single incident insufficient to establish custom); *Fraire v. City of Arlington*, 957 F.2d 1268, 1278 (5th Cir.), *cert. denied*, 113 S.Ct. 462 (1992) (custom or policy requires pattern of similar incidents). Plaintiffs cannot bootstrap liability against the City in this fashion. Summary judgment is proper as to this claim.[12]

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[12] Plaintiffs protest that they were precluded from taking any discovery on certain aspects of their municipal liability claim by virtue of a court order dated February 25, 2000. (Plf. Brief at 24; Hamilton Aff. ¶ 2.1). This argument is rather disingenuous. In its order granting in part and denying in part plaintiffs' motion to lift a discovery stay, the Court wrote:

> [M]uch of the discovery requested by plaintiffs is directed to the City of Dallas and goes to the issue of municipal liability. A municipality is not entitled to qualified immunity. [Citations omitted]. Therefore, *plaintiffs should be allowed to conduct discovery in order to pursue their claims against this defendant*. [Citations omitted].

Sorrells, 192 F.R.D. at 210 (emphasis added). The Court allowed plaintiffs to conduct full discovery on all aspects of their municipal liability claim. Plaintiffs have no one but themselves to blame for failing to take advantage of that opportunity.

VI.

Plaintiffs allege that Dallas Police Chief Bennie Click and Dallas Fire Chiefs Roland Gamez and Joseph Vasquez "adopted, approved, ratified, and silently acquiesced" in the policies followed by the police officers and paramedics who encountered Shane Sorrells. (Plf. Compl. ¶¶ 4.08-4.17 & 4.18-4.27). This claim fails for two reasons. First, there is no evidence that the department chiefs personally participated in acts that caused a constitutional deprivation. *See Jett v. Dallas Independent School District*, 491 U.S. 701, 736, 109 S.Ct. 2702, 2723, 105 L.Ed.2d 598 (1989); *Thompson v. Steele*, 709 F.2d 381, 382 (5th Cir.), *cert. denied*, 104 S.Ct. 248 (1983) (personal involvement is an essential element in civil rights cause of action). Second, plaintiffs have not established the existence of an unconstitutional policy or custom which led to Sorrells' death. Accordingly, these defendants are entitled to summary judgment.[13]

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[13] Even if plaintiffs were able to establish the existence of an unconstitutional policy, they have not shown that the department chiefs are "policymakers." The Dallas City Charter provides that "all powers conferred on the city shall be exercised by a city council . . . unless otherwise provided by law." DALLAS CITY CHARTER, Ch. HI, § 1 (1993). The council is required to appoint a city manager who acts as chief administrative and executive officer. *Id.* Ch. VI, §§ 1-2. Department chiefs are appointed by and directly responsible to the city manager. *Id.*, Ch. VI, § 2-(3). The police chief has ultimate responsibility for the "administration, command and external relations of the police department." (Plf. App. at 7). However, the city council and city manager are authorized to inquire into and investigate the conduct of any city department. DALLAS CITY CHARTER, Ch. III, § 18. Absent evidence to the contrary, the Court must assume that policymaking authority resides with the City's governing body. *See Atkins v. City of Carrollton*, 1997 WL 160297 at *4 (N.D. Tex. Mar. 27, 1997) (Fitzwater,

(Continued on following page)

VII.

Finally, defendants seek summary judgment on plaintiffs' state law claims for assault, battery, false imprisonment, intentional infliction of emotional distress, and negligence. The City contends that these claims are barred by the doctrine of sovereign immunity. The individual defendants claim official immunity.

A.

Under Texas law, a municipality is not liable for the torts of its agents unless there is a constitutional or statutory waiver of immunity. *Mt. Pleasant Independent School District v. Estate of Lindburg*, 766 S.W.2d 208, 211 (Tex. 1989). The Texas Tort Claims Act waives sovereign immunity if certain conditions are met. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.102, *et seq.* (Vernon 1986). The statute provides for a waiver of immunity in cases of "personal injury and death so caused by a condition or use of tangible personal or real property if he governmental unit would, were it a private person, be liable to the claimant according to Texas law." *Id.* § 101.021; *Evans v. City of Marlin*, 986 F.2d 104, 108-09 (5th Cir. 1993). However, immunity is not waived for "assault, battery, false imprisonment, or any other intentional tort." TEX. CIV. PRAC. & REM. CODE ANN. § 101.057; *Gillum v. City of Kerrville*, 3 F.3d 117, 123 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 881 (1994).

J.); *Lowrey v. Redington*, 1997 WL 10018 at *10 (N.D. Tex. Jan. 6, 1997) (Solis, J.).

It is clear that the City is not liable for the intentional conduct of its employees. Although the negligent conduct of police officers and paramedics may subject the City to liability under the Texas Tort Claims Act, plaintiffs have failed to adduce any evidence to support such a claim. In fact, they do not even brief the issue in their response to defendants' motion for summary judgment. The City is entitled to summary judgment on its sovereign immunity defense.

B.

Municipal employees are immune from suit for discretionary acts performed in good faith while acting within the scope of their authority. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994). This legal analysis is the same under both federal and state law. *Cantu v. Rocha*, 77 F.3d 795, 808 (5th Cir. 1996). The issue is "whether a reasonable official could have believed his or her conduct to be lawful in light of clearly established law and the information possessed by the official at the time the conduct occurred." *Chambers*, 883 S.W.2d at 656, *quoting Swint v. City of Wadley*, 5 F.3d 1435, 1441-42 (5th Cir. 1993).

The Court has already determined that genuine issues of material fact preclude summary judgment in favor of Sergeant Griffis, Corporal Cutrona, and Officer Readdy on their federal immunity defenses. These same fact issues also preclude summary judgment on the grounds of official immunity. However, there is no evidence that any of the other defendants acted in an objectively unreasonable manner. Therefore, summary judgment is proper as to those defendants.

RECOMMENDATION

Defendants' motion for summary judgment should be granted in part and denied in part. Plaintiffs should be allowed to prosecute their excessive force claim, failure to protect claim, and state law claims against Sergeant Stanely Griffis, Corporal Joseph Cutrona, and Officer William Readdy. To that extent, defendants' motion for summary judgment should be denied. The motion should be granted in all other respects.

DATED: December 15, 2000.

/s/ Jeff Kaplan
JEFF KAPLAN
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ESTATE OF SHANE G. SORRELLS, by and through Its Independent Executrix, SHERYL THOSTENSON, SHERYL THOSTENSON, Individually, DANA FONTENOT, as Next Friend of CHANDLER SORRELLS, a Minor, PAT SORRELLS, RITA SORRELLS, and STEPHANIE SORRELLS,	§	
Plaintiffs,	§	CIVIL ACTION NO.
vs.	§	3-99CV1185-P
CITY OF DALLAS, CHIEF OF POLICE BENNIE R. CLICK, OFFICER JOSEPH CUTRONA, OFFICER RICHARD HUNT, OFFICER THOMAS MOORE, OFFICER WILLIAM READDY, OFFICER ARNALDO RIVERA, SERGEANT STANLEY GRIFFIS, FIRE CHIEFS ROLAND GAMEZ and JOSEPH VASQUEZ, UNKNOWN PERSONNEL OF THE DALLAS POLICE DEPARTMENT, and UNKNOWN PERSONNEL OF EMERGENCY MEDICAL SERVICES,	§	
Defendants.	§	"JURY"

PLAINTIFFS' ORIGINAL COMPLAINT and JURY DEMAND

(Filed May 24, 1999)

* * *

3.0
FACTS

3.01 On September 17, 1998, sometime between approximately 2:00 and 3:00 p.m., Mr. Sorrells used an unknown amount of cocaine. He then got in his car, a Ford Thunderbird, and drove on the North Dallas Tollway ("Tollway"). At approximately 5:08 p.m., Mr. Sorrells exited the Tollway at the Wycliff exit. He proceeded to drive to a small apartment complex at 3910 North Hall Street, in Dallas, Texas (the "Apartments"). He entered the alley behind the Apartments and parked his car in a narrow parking lot behind the Apartments.

3.02 At approximately 5:30 p.m. in the afternoon of September 17, 1998, a resident of the Apartments called "911" to report an indecent exposure. The resident had stepped outside, onto her balcony, where she was able to look down, through the windshield, into Mr. Sorrell's car. There she witnessed him sitting in the driver's seat, nude and masturbating.

3.03 Officers Cutrona and Readdy responded to the 911 call within minutes. One or both of the Officers entered the woman's apartment and looked down through the windshield of Mr. Sorrells' car. The Officer(s) saw Mr. Sorrells sitting in the driver's seat of his car, nude and masturbating.

3.04 Upon information and belief, at this point, one of the Officers radioed for support.

3.05 While awaiting police support, Officers Cutrona and Readdy approached Mr. Sorrells' car, in which Mr. Sorrells had isolated himself by locking the doors and rolling up the windows.

3.06 When the Officers approached, Mr. Sorrells showed no meaningful awareness of their presence. He made no attempt to flee the scene, or otherwise escape. Nor did he attempt to dress or otherwise cover himself.

3.07 Beyond question, Mr. Sorrells appeared to be a mentally disturbed and non-violent individual. Officers Cutrona and Readdy immediately recognized him, or should have recognized him, as such.

3.08 The Officers tapped on the windows and instructed Mr. Sorrells to get out of his car. Mr. Sorrells did not respond to their requests. At this point, upon information and belief, they concluded that Mr. Sorrells probably was under the influence of drugs or otherwise mentally disturbed.

3.09 Officers Cutrona and Readdy then decided to spray a chemical agent, Oleoresin Capsicum Spray ("OC Spray"), into Mr. Sorrells' car, to force him to get out. Upon information and belief, and in accordance with DPD protocols, the Officers called for EMS support at this point – *prior* to their using any OC Spray.

3.10 OC Spray consists of, among other things, extracts of hot cayenne peppers, jalapenos, cayenne, and habaneros. The active ingredient, capsicum, is an inflammatory agent. When OC Spray contacts the mucus membrances of the eyes, nose, throat, and lungs, it causes immediate dilation of capillaries and, therefore, inhibition of breathing ability. The effects of exposure to OC Spray

include: (1) temporary blindness; and (2) instant inflammation of the breathing tubes, cutting off all but the minimum breathing necessary to sustain life.

3.11 All police officers who use OC Spray recognize the effects described in ¶ 3.10, *supra*, to be the result of their using OC Spray. Indeed, these effects are precisely why police officers use OC Spray to subdue suspects.

3.12 It also is common knowledge among police personnel nationwide that deaths in custody occur with a higher frequency when police officers use OC Spray on a suspect who is under the influence of cocaine (or a similar, stimulating drug) and/or has breathing difficulties.

3.13 OC Spray manufacturers therefore typically advise that police officers should not use more than *two blasts* of OC Spray on any one suspect.

3.14 At approximately 5:36 to 5:38 p.m., Sergeant Griffis arrived on the scene. EMS arrived on the scene either at this time or immediately thereafter. Sergeant Griffis, like Officers Cutrona and Readdy, knew or should have known the consequences and effects of using OC Spray. Upon information and belief, he also recognized or should have recognized – immediately – that Mr. Sorrells was a mentally disturbed person and/or on drugs.

3.15 All three Officers, however, chose to disregard their knowledge of (1) the harmful interplay between cocaine (or similar, stimulating drugs) and OC Spray and (2) the danger of using more than two blasts of OC Spray. They accordingly emptied the contents of an entire canister of OC Spray through the car's air conditioning vents and sun roof, having pried open the latter.

3.16 Upon information and belief, at the time the three Officers made this decision, they still believed Mr. Sorrells to be under the influence of drugs or otherwise mentally disturbed.

3.17 Mr. Sorrells failed to respond to any of the Officers' efforts to force him from the car. Indeed, he did not attempt to flee the scene or escape. He simply remained in the car, virtually unaware of their presence.

3.18 In short, up to this point, Mr. Sorrells had remained entirely non-responsive and passive. This was the full extent of his resistance up to this point in time. In fact, DPD since has admitted to the Sorrells Family that, *up to this point in time*: (1) "He wasn't going anywhere" and (2) that he "probably" was not a threat to anyone.

3.19 Meanwhile the commotion created by the Officers' efforts to urge Mr. Sorrells from his car had attracted a small crowed of witnesses in the alley and parking lot behind the Apartments.

3.20 Notwithstanding the obvious solution of waiting for Mr. Sorrells to "come to" and get out of his car, the Officers decided to smash the front, passenger-side window of the car and drag Mr. Sorrells out.

3.21 Sergeant Griffis borrowed either Officer Cutrona's or Readdy's expandable metal baton and smashed the passenger-side window.

3.22 Flying pieces of glass cut Mr. Sorrells, who began to bleed profusely. One of the Officers present then chose, again, to spray Mr. Sorrells with still more OC Spray through the broken window.

3.23 Upon information and belief, the Officers and Sergeant Griffis recognized that Mr. Sorrells was so soaked with OC Spray by this time that his entire body appeared "slippery" and slick with oily moisture. Purportedly because of Mr. Sorrells' condition and size (he was a large man), Sergeant Griffis called for additional DPD Personnel support on or about this time.

3.24 Prior to the arrival of additional support, however, and after unlocking the car's central, electronic door-locks, the Officers and Sergeant Griffis grabbed Mr. Sorrells and dragged him out of his car. They had difficulty grasping Mr. Sorrells, of course, because he was nude, covered witn oily moisture, and soaked by OC Spray.

3.25 Yet Mr. Sorrells still made no attempt to resist arrest or escape. Rather, the phrase "lack of cognitive awareness" best characterizes his response to the Officers and Sergeant Griffis even up to this point.

3.26 The Officers and Sergeant Griffis next attempted to handcuff Mr. Sorrells. When they did so, Mr. Sorrells displayed the most confrontational conduct in which he was to engage prior to his death; he struggled to avoid handcuffing. There is no dispute as to whether Mr. Sorrells posed any harm or threat of harm to the Officers, Sergeant Griffis, or anyone else at this time. Even if he continued to masturbate (a matter of contention), given that masturbation does not constitute a "deadly attack" under any known standard of human experience, the Officers' and Sergeant Griffis' decisions from this point on were illegal because (1) the law, as it existed at the time, did not warrant the use of deadly force, and (2) their conduct was extraordinary in its cruelty, rising to the level of torture. *See Tennessee v. Garner,* 471 U.S. 1, 11, 105 S.

Ct. 1694, 1701 (1985) ("Where the suspect poses no immediate threat to the officer and no threat, to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.")

3.27 Upon information and belief, it is at the approximate time that three more officers, Officers Hunt, Moore, and Rivera, arrived.

3.28 One Officer took the baton used to smash the window of the vehicle and began to strike Mr. Sorrells repeatedly on his back, neck, arms, and legs. He struck Mr. Sorrells between twenty-five and thirty times. In beating Mr. Sorrells in this manner, the Officers and Sergeant Griffis "got Mr. Sorrells to the ground." Notwithstanding the fact that one officer now had "brought down" Mr. Sorrells, the other officer chose to place him in a "choke-hold." The circumstances here, obviously, did not warrant the use of a choke-hold, a legally recognized form of "deadly force." *See, e.g., Gutierrez v. San Antonio,* 139 F.3d 441, 446-47 (5th Cir. 1998), and *McQurter v. Atlanta,* 572 F. Supp. 1401, 1414 (N.D. Ga. 1983).

3.29 A choke-hold is a form of "deadly force" because it either (1) cuts off the blood supply to the brain by compressing the arteries in the neck or (2) cuts off the flow of oxygen by compressing the flow of oxygen to the brain and lungs. Without oxygen, the subject quickly becomes unconscious unless the person applying the choke-hold releases the pressure.

3.30 Two variants of choke-hold exist and DPD recognizes them as the: (1) Lateral Vascular Neck Restraint ("VNR"); and (2) Bar Arm Hold ("Bar Hold"). A VNR choke-hold is theoretically less risky than a Bar Hold. The Bar Hold cuts horizontally across suspect's

throat and, therefore, larynx and trachea; the VNR, on the other hand, when performed correctly, merely causes pressure on the carotid arteries, which run vertically along the sides of the neck. Both forms, however, constitute deadly force. *See, e.g., Gutierrez v. San Antonio,* 139 F.3d at 446-47, and *McQurter v. Atlanta,* 572 F. Supp. at 1414.

3.31 Even VNR choke-holds are inherently dangerous and pose a foreseeable risk of death or serious injury. In many cases, VNR-restrained individuals die as a result of imprecise or improper application of the VNR technique. For example, and as occurred here, the person applying the VNR choke-hold may, during a struggle, be unable to maintain his grasp as a "VNR" and, instead, allow his grasp to slip or twist into a Bar Hold. This change in position may result in the crushing of a suspect's larynx and trachea and the concomitant cutting off of all oxygen to the suspect's brain.

3.32 Furthermore, choke-holds – because they result in anoxia – are more likely to be lethal when used in combination with OC Spray. This is because OC Spray paralyzes a suspect's ability to breathe efficiently while the choke-hold cuts off from the brain what little oxygen remains in the blood stream. The risk of death under these circumstances is enhanced even further if the person utilizing the choke-hold continues to use it on a suspect in a prone position. This is because when a suspect is in a prone position, an officer may not be able to determine whether the suspect has lost consciousness or, instead, merely has given up his struggle. Finally, the risk of death is enhanced still further when the suspect has used cocaine or (a similar stimulant), which causes additional reduction in oxygen intake.

3.33 Here, the Officer utilizing the choke-hold on Mr. Sorrells released him when he fell to his knees. The Officer with the baton, however, continued to strike Mr. Sorrells in the back, neck, arms, and legs. Seeking to avoid the Officers' blows, Mr. Sorrells managed to stand up. During the ensuing struggle, Mr. Sorrells either spit in one Officer's face or the force of the struggle otherwise forced oily moisture from his body to fly into the Officer's eye. When the Officer with the OC Spray in his eyes started to yell with pain, the other Officers and Sergeant Griffis momentarily focused their attention on their comrade and away from Mr. Sorrells.

3.34 During this interval, the battered, disoriented, and nude Mr. Sorrells stumbled off, attempting to escape, as one witness put it, "on tip toe."

3.35 The Officers and Sergeant Griffis, now whipped into a frenzy, apparently as a result of the saliva incident and the feeble, naked "tip-toe" escape attempt (neither of which constituted a threat of injury to anyone), quickly apprehended Mr. Sorrells. And, again, one Officer determined to use deadly force in the form of a choke-hold. And, again, the Officer brought Mr. Sorrells to the ground. And, again, because Mr. Sorrells still had not posed a risk of injury to *anyone*, deadly force was illegal. *See Tennessee v. Garner*, 471 U.S. at 11, 105 S. Ct. at 1701 ("Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.")

3.36 Another Officer, on information and belief, Officer Readdy, began to kick Mr. Sorrells repeatedly and viciously. This time, however, the Officer using the choke-hold did not release Mr. Sorrells, even after he collapsed.

The Officers and Sergeant Griffis then forced him into a prone position. The Officer maintaining the choke-hold, continued to hold it even (1) after Mr. Sorrells was in a prone position and (2) while Officer Readdy continued his vicious kicking attack. After still further vicious assaults, the five Officers and Sergeant Griffis placed Mr. Sorrells in handcuffs. Two Officers restrained his feet; one anchored his belly; and two restrained him at his head, including the Officer still applying the choke-hold.

3.37 The Officers and Sergeant Griffis had incapacitated Mr. Sorrells completely. He was unable to resist arrest or pose a danger to either the Officers or the public. Indeed, by this point, the Officers and Sergeant Griffis had succeeded in crushing Mr. Sorrells' larynx and trachea. Nevertheless, another Officer took this opportunity to torture Mr. Sorrells by thrusting his baton repeatedly into Mr. Sorrells' stomach. The thrusting of a pointed instrument into the stomach of a man dying by suffocation simply *is* torture.

3.38 The Officers' focus now shifted to themselves and they left Mr. Sorrells effectively unattended on the ground. Although two Officers remained, holding Mr. Sorrells in the prone position, handcuffed, and in a choke-hold for approximately 5 to 8 minutes, they, too, allowed their attention to wander.

3.39 Accordingly, Mr. Sorrells remained essentially ignored by everyone – including Unknown EMS personnel and Sergeant Griffis, who were busy attending to the Officer with OC Spray in his eye. At no point did any EMS Personnel or Sergeant Griffis attempts to ascertain whether Mr. Sorrells had lost consciousness, despite his

having been subjected to two choke-holds, apparently in their presence.

3.40 Indeed, Unknown EMS Personnel and Sergeant Griffis were conspicuous in their presence throughout these events and conspicuous in their absence in terms of intervening to protect Mr. Sorrells or otherwise rendering aid. Their failure to attend to Mr. Sorrells is especially unconscionable in light of the fact that (1) DPD protocols required the calling of EMS prior to the use of OC Spray (much less choke-holds and torture) and (2) EMS carries special irrigation equipment to flush OC spray from officers' and/or suspects' eyes and other mucousal areas. And, of course, EMS stocks its ambulances with "ambu" bags and other resuscitative equipment.

3.41 Upon information and belief, by no later than 6:00 p.m., the Officers, Sergeant Griffis, and Unknown EMS Personnel present finally had recognized that Mr. Sorrells' face was discolored and that he had ceased breathing. Accordingly, in the half hour that elapsed between when the DPD received the 911 call [sic] when anyone first noticed Mr. Sorrells' lack of breathing, – DPD and EMS had managed to:

(1) Douse Mr. Sorrells from head to foot with more than an entire canister of OC Spray;

(2) Cut Mr. Sorrells with broken glass;

(3) Strike Mr. Sorrells over 25 times, all over his body, with a metal baton;

(4) Choke Mr. Sorrells twice, crushing his larynx;

(5) Torture Mr. Sorrells by repeatedly beating him, kicking him, and thrusting a baton into his stomach when he was suffering; and

(6) Ignore Mr. Sorrells completely as he lay dying.

3.42 Although the EMS Personnel transferred Mr. Sorrells to the ambulance, they did not leave the scene for approximately another 10 minutes.

3.43 Upon Mr. Sorrells' arrival at Parkland Hospital, and after several efforts to revive him, medical personnel declared Mr. Sorrells to be dead at approximately 6:52 p.m.

3.44 Parkland Hospital transferred Mr. Sorrells' body to the Officer of the Medical Examiner of Dallas County ("Coroner's Office") shortly thereafter. On or about September 18, 1999, the Coroner's Office performed an autopsy on Mr. Sorrells and concluded that his death was a "homicide."

3.45 In the meantime, DPD, who had taken a mere half hour to kill Mr. Sorrells, took four hours to notify any member of the Sorrells Family. Upon information and belief, during this time period, Unknown DPD Personnel removed evidence from Mr. Sorrells' car. (Indeed, Unknown DPD Personnel utilized information from documents within Mr. Sorrells' car to locate his attorney. Photographs of the vehicle reflect other documents in the car. Yet, to date, DPD has refused to even *itemize,* much less return, Mr. Sorrells' belongings to the Sorrells Family.) When DPD finally did notify the Sorrells' Family, the notifying individual(s) presented the circumstances of his death to them in a misleading fashion that omitted any account of the Officers' brutality and, instead, (1) claimed

Mr. Sorrells' had posed a risk of danger to persons in the vicinity and (2) emphasized his pathetic condition, claiming he was "wearing panty hose" during his attack on the Officers.

3.46 Within two days of Mr. Sorrells' homicide, DPD announced that, "[P]reliminary indications are that all procedures were followed." DPD also released to the media extensive, unflattering commentary on Mr. Sorrells' condition at the time of arrest, in an effort to discredit any version of events that might render him even slightly sympathetic. DPD further depicted Mr. Sorrellas as a potential threat to the safety of children, a potential serial exposer, and a man of enormous build who posed a threat of violence to those present – clad in panty hose. Not one of those statements was true. Not one.

3.47 Upon information and belief, after Mr. Sorrells' homicide, DPD further issued a written report that failed to so much as mention that one of the Officers had repeatedly kicked Mr. Sorrells, not withstanding numerous, credible witnesses' statements to this effect. Further, upon information and belief, DPD Internal Affairs' investigation of this incident has exonerated all of the Officers and Sergeant Griffis completely. Plaintiffs do not know what investigation, if any, EMS performed as to the Unknown EMS Personnel's role in the incident.

3.48 Upon information and belief, Unknown DPD Personnel pressured the Coroners' Office *not* to enter a finding of "homicide."

3.49 Upon information and belief, Unknown DPD Personnel pressured the witnesses to Mr. Sorrells' death to render statements favorable to the Officers and unfavorable to Mr. Sorrells.

3.50 On or about February 25, 1999, the Dallas County Grand Jury declined to indict any of the Officers in connection with Mr. Sorrells' death.

4.0
CLAIMS

4.01 The Sorrells Family re-alleges and incorporates herein by reference ¶¶ 1.01-3.50.

A. Officers Moore, Cutrona, Hunt, Readdy, and Rivera and Sergeant Griffis.

4.02 Officers Moore, Cutrona, Hunt, Readdy, and Rivera and Sergeant Griffis, without provocation or need, assaulted and battered Mr. Sorrells, causing him severe injury and suffering, and ultimately death, while he was in their close custody, unarmed and unable to resist. The Officers and Sergeant Griffis chose to use deadly force and torture when neither option was appropriate, or even legal. They chose further to neither intervene to protect Mr. Sorrells nor to otherwise render aid. The specific conduct at issue includes, but is not limited to:

(1) Using any form of choke-hold;

(2) Using any form of choke-hold when deadly force was not warranted;

(3) Using any form of choke-hold on a suspect in a prone position;

(4) Using any form of choke-hold to bring a suspect down more than one time;

(5) Using any form of choke-hold on an individual who has been doused with OC

Spray and appears to be on drugs or otherwise mentally disabled;

(6) Using a Bar Hold choke-hold when a VNR choke-hold should be used;

(7) Using an entire canister of OC Spray;

(8) Using any OC Spray in conjunction with a choke-hold;

(9) Using any OC Spray on an individual who appears to be on drugs or otherwise mentally disabled;

(10) Kicking and beating an individual who is not posing a threat of harm to anyone;

(11) Kicking and beating a nude individual who has been soaked with OC Spray and is held in any form of choke-hold;

(12) Kicking and beating an individual who has been brought to the ground through the use of any form of choke-hold;

(13) Torturing an individual who has been brought to the ground twice through the use of any form of choke-hold;

(14) Using deadly force;

(15) Using excessive force;

(16) Using torture;

(17) Declining to intervene – to "protect" and "serve" – when they witness fellow officers murdering and/or torturing a suspect; and

(18) Declining to render aid to a suspect they either have incapacitated or wrongfully allowed a fellow officer to incapacitate.

4.03 As a result of their concerted and malicious treatment of Mr. Sorrells, Officers Cutrona, Hunt, Moore, Readdy, and Rivera, and Sergeant Griffis (1) intentionally or (2) with callous disregard and deliberate indifference of Mr. Sorrells' rights, deprived him and the Sorrells Family of their rights to Due Process and Equal Protection of the law, in violation of the Fourth and Fourteenth Amendments of the United States Constitution.

4.04 As a result of their concerted and malicious treatment of Mr. Sorrells, Officers Cutrona, Hunt, Moore, Readdy, and Rivera, and Sergeant Griffis (1) intentionally or (2) with callous disregard and deliberate indifference of Mr. Sorrells' rights, deprived him and the Sorrells Family of their rights to Due Process and Equal Protection of the law, in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

4.05 As a result of their concerted and malicious treatment of Mr. Sorrells, Officers Cutrona, Hunt, Moore, Readdy, and Rivera, and Sergeant Griffis (1) intentionally or (2) with callous disregard and deliberate indifference of Mr. Sorrells' rights, denied him and the Sorrells Family of the privileges and immunities afforded to them by Article IV, § 2 to, and the Fourteenth Amendment of the United States Constitution.

4.06 As a result of their concerted and malicious treatment of Mr. Sorrells, Officers Cutrona, Hunt, Moore, Readdy, and Rivera, and Sergeant Griffis (1) intentionally or (2) with callous disregard and deliberate indifference of Mr. Sorrells' rights, deprived him and the Sorrells Family of their rights under 42 U.S.C. § 1983.

4.07 As a result of their concerted and malicious treatment of Mr. Sorrells, Officers Cutrona, Hunt, Moore,

Readdy, and Rivera, and Sergeant Griffis (1) intentionally or (2) with callous disregard and deliberate indifference of Mr. Sorrells' rights, conspired to deprive him and the Sorrells Family of their rights, as described in ¶¶ 4.03-4.06, *supra*, and protected by 42 U.S.C. § 1985.

* * *

6.0
DAMAGES

6.01 The Sorrells Family realleges and incorporates herein by reference ¶¶ 1.01-5.05

6.02 All of the foregoing actions and failures to act by all of the Defendants resulted in Mr. Sorrells' anguish, death, loss of income, pain, serious physical injuries, and suffering.

6.03 All of the foregoing actions and failures to act by all of the Defendants resulted in the loss to Chandler Sorrells of his father, Mr. Sorrells, with the attendant loss of parental affection, anguish, and support, economic and emotional.

6.04 All of the foregoing actions and failures to act by all of the Defendants resulted in loss to Pat and Rita Sorrells of their only son, Mr. Sorrells, with the attendant loss of affection, anguish, and support, economic and emotional.

6.05 All of the foregoing actions and failures to act by all of the Defendants resulted in loss to Sheryl Thostenson and Stephanie Sorrells of their brother, Mr. Sorrells, with the attendant loss of sibling affection, anguish, and support, economic and emotional.

6.06 Plaintiffs accordingly demand judgment against Defendants, jointly and severally, for compensatory damages, as described in ¶¶ 5.1-5.8, *supra*. Plaintiffs further demand judgment against each of said Defendants, jointly and severally, for punitive damages. Plaintiffs seek an amount of not less than $30 million.

6.07. Both pre- and post-judgment interest accrue as to the damages described in ¶¶ 6.01-6.06, *supra*.

6.08 The Estate, Sorrells Family and Chandler Sorrells, by and through Dana Fontenot, were required to bring this suit and employ the services of counsel to bring the claims herein. Accordingly, they are entitled to an award of attorneys' fees and court costs.

* * *

Supreme Court
FILED
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No. 02-559

In the
Supreme Court of the United States
October Term, 2002

JOSEPH CUTRONA, WILLIAM READDY, and STANLEY GRIFFIS,
Petitioners,

vs.

ESTATE of SHANE G. SORRELLS, By and Through Its Independent Executrix, Sheryl Thostenson, DANA FONTENOT, as Next Friend of Chandler Sorrells, a Minor, PAT SORRELLS, and RITA SORRELLS,
Respondents.

On Petition For a Writ Of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

In addition to the parties listed by Petitioners, Joseph Cutrona, William Readdy, and Stanley Griffis (sometimes the "Officers"), one other party warrants mention. The City of Dallas is the Respondent in Cause No. 02-641, a proceeding parallel to this one. In Cause No. 02-641, the Estate of Shane G. Sorrells, By and Through Its Independent Executrix, Sheryl Thostenson, Dana Fontenot, as Next Friend of Chandler Sorrells, a Minor, Pat Sorrells, and Rita Sorrells (sometimes the "Sorrells Family") petition this Court to grant a writ of certiorari to review the same Fifth Circuit opinion at issue in this cause. Unless and until this Court consolidates these two petitions, and for the sake of simplicity, the Sorrells Family refers to the two petitions as the "Officers' Petition" and the "Sorrells Family's Petition." Both Petitions address the same nexus of facts.

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REASONS FOR DENYING THE WRIT

The Petition filed by the Officers raises two issues for the Court's determination. The first is whether the Fifth Circuit Court of Appeals correctly decided federal law does not entitle the Officers to invoke the affirmative defense of "qualified immunity." The Officers argue that the Fifth Circuit's opinion with respect to the qualified immunity issue is in conflict with this Court's prior decisions because the Fifth Circuit failed to determine whether the Sorrells Family:

(1) Pleaded any constitutional violation at all, as an initial matter; and,

(2) Alleged, with appropriate specificity, that federal law "clearly established" the constitutional rights at issue at the time of the incident in question.

The Sorrells Family contend that regardless of whether the Court of Appeals' exhaustively examined their pleadings in its opinion, as the Officers require, the Sorrells Family, in fact, did plead a violation of numerous clearly established constitutional violations.

The second issue that the Officers raise is whether the Fifth Circuit's decision on the qualified immunity issue is in conflict with prior decisions of this Court to the extent that it failed to address the objective-reasonableness prong of the qualified immunity analysis separately from the objective-reasonableness prong of an excessive force claim.

The Sorrells Family responds, again, that regardless of which analysis applied, the same result as to qualified immunity lies, namely, that the immunity does not shield – as a matter of law – the Officers' conduct in this case.

I.
THE SORRELLS FAMILY SUFFICIENTLY PLEADED FACTS THAT PRECLUDE SUMMARY JUDGMENT AS A MATTER OF LAW REGARDING WHETHER THE OFFICERS ARE "QUALIFIEDLY IMMUNE"

The Officers claim that, to the extent that the Fifth Circuit failed to decide the "qualified immunity" issue *after* it had resolved any pleadings issues, its decision is in conflict with the law of other circuits and of this Court.

A complaint "shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A civil rights plaintiff must plead facts with particularity and specificity to overcome a defendant official's claim of qualified immunity. *See, e.g., Reyes v. Sazan*, 168 F.3^{d} 158, 161 (5th Cir. 1999). This "[h]eightened pleading requires allegations of fact focusing specifically on the conduct of the individual who caused the plaintiff's injury." *Id.* (citation omitted). The quality of facts that the plaintiff alleges must be such that the reviewing court can determine whether no reasonable officer could have misunderstood that the defendant's actions violated federal law. *See, e.g., Brown v. Glossip*, 878 F.2d 871, 874 (5th Cir. 1989).

In order determine whether, upon sufficiently specific pleading, qualified immunity protects a given government official's conduct, a Court must determine:

(1) Whether a plaintiff has alleged a violation of a clearly established right; *and*

(2) If so, whether the defendants' conduct was objectively reasonable in light of clearly established law at the time of the alleged deprivation.

See, e.g., Wilson v. Layne, 526 U.S. 603, 609, 119 S. Ct. 1692, 1697 (1999), *Siegert v. Gilley*, 500 U.S. 226, 232, 111 S. Ct. 1789, 1793 (1991), and *Petta v. Rivera*, 143 F.3d 895, 899 (5th Cir. 1998). The first prong is purely a question of law. *Siegert*, 500 U.S. at 232, 111 S. Ct. at 1793; *see also Samaad v. City of Dallas*, 940 F.2d 925, 940 (5th Cir. 1991). In resolving this question, courts interpret the law as of the time of the incident at issue. *Wilson*, 526 U.S. at 609, 119 S. Ct. at 1697, and *Siegert*, 500 U.S. at 232, 111 S. Ct. at 1793-94.

The first – or "clearly established law" – prong can be separated further into three, distinct issues:

(1) Has the plaintiff alleged the deprivation of a constitutional right?; *if so*

(2) Was this right "clearly established" at the time of the alleged deprivation?; *and, if so,*

(3) Does the record "at least give[] rise to a genuine issue of material fact as to whether the defendants actually engaged in the conduct that violated this clearly established right"?

See, e.g., Wallace v. Wellborn, 204 F.3d 165, 167 (5th Cir. 2000), *cert. denied*, 531 U.S. 991, 121 S. Ct. 480 (2000)).

"For a right to be clearly established, 'the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *See, e.g., Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039 (1987).

The second prong of the inquiry necessarily depends on the unique circumstances of each case. *Anderson*, 483 U.S. at 639-40, 107 S. Ct. at 3039-40. One circumstance that is *not* relevant, however, is the official's subjective intent. *Anderson*, 483 U.S. at 640, 107 S. Ct. at 3040. Even if he acted with malice, if his conduct was objectively reasonable, he is protected by the defense. *Gutierrez v. City of San Antonio*, 139 F.3d 441, 445 (5th Cir. 1998). Furthermore, if his conduct was objectively reasonable, he is qualifiedly immune from suit when his conduct was objectively reasonable *even if it violates federal law*. *Id.* at 445.

Finally, if this two-part analysis results favorably for the plaintiff, then the Court must consider further "whether the defendants actually engaged in the conduct that violated this clearly established right." *See, e.g., Wallace*, 204 F.3d at 167.

The Officers contend that the Sorrells Family's allegations (as stated in Plaintiffs' Original Complaint (the "Complaint")) are "conclusory, speculative, inflammatory, and fail to set forth sufficient facts." (Officers' Petition at 10.) While sheer volume of words is not dispositive of this issue, the Sorrells Family asks the Court to consider the language of the Complaint. (Officers' Petition, Appendix ("App.") at 42-59.) In 50 separate paragraphs, the Sorrells Family depicted in detail the precise nexus of facts upon which they premise their claims. (Officers' Petition, App. at 42-59.) *See Estate of Sorrells v. City of Dallas*, 192 F.R.D. 203, 208-09 & n.5 (N.D. Tex. 2000).

The Complaint specifically alleges the facts that constitute recognized actions for unconstitutional use of excessive force, use of deadly force, and failure to intervene and/or protect, *viz.*:

(1) Excessive force in general – *compare* Complaint (Officers' Petition, App. at 43-58)

with Goodson v. City of Corpus Christi, 202 F.3rd 730, 740 (5th Cir. 2000) (elements of an excessive force claim);

(2) Improper use of deadly force – *compare* Complaint (Officers' Petition, App. at 43-58) *with Tennessee v. Garner*, 471 U.S. 1, 11, 105 S. Ct. 1694, 1701 (1985) (holding that the use of deadly force is not justified to prevent an unarmed suspect from evading arrest), and *Gutierrez v. San Antonio*, 139 F.3d at 446 (holding that a chokehold is the use of deadly force); and

(3) Failure to intervene and/or protect – *compare* Complaint (Officers' Petition, App. at 43-58) *with Estelle v. Gamble*, 429 U.S. 97, 102-03, 97 S. Ct. 285, 290 (1976) (requiring a showing of "callous or conscious" indifference to "serious medical needs" by "each officer present.").[1]

Further, the Complaint specifically alleges violations of these clearly established, well-recognized standards. *First*, the Sorrells Family pleaded properly the Officers' use of OC Spray, beating, kicking, chokeholds, pinning in a prone position, and prods with a baton – singly and together – as a basis for an excessive force claim.

Second, the Sorrells Family pleaded properly the Officers' use of OC Spray, choke-holds (including the particular form of the chokehold used), beatings, kickings,

---

[1] The Sorrells Family, in particular, raised a genuine issue of material fact as to whether the use of a chokehold, given the facts, constituted the use of deadly force. *See McQurter v. Atlanta*, 572 F. Supp. 1401, 1414 (N.D. Ga. 1983).

pinning in a prone position, and prods with a baton – singly and together – as a basis for an improper use of deadly force claim.

Third, the Sorrells Family pleaded properly the Officers' above-described conduct and their subsequent failure to render aid (even after Mr. Sorrells stated, "That's enough." and "I can't breathe." – and his subsequent turning blue in the face), compounded by holding him in a prone position and then prodding him in the stomach with a baton – singly and together – as a basis for a claim of failure to intervene and/or protect.

In short, the Sorrells Family met their pleading burden: they identified the precise conduct at issue.

Accordingly, regardless of whether the Fifth Circuit should have addressed the pleadings matter in some chronological fashion more suitable to the Officers' purposes, the Sorrells Family did plead sufficiently. This issue thus is of no consequence. Further, and as a practical matter, the District Court addressed the pleadings issue first and the Court of Appeals affirmed that decision. *See Estate of Sorrells v. City of Dallas*, 192 F.R.D. at 203.

In sum, the Officers are wrong when they contend that case law from this Court and that of other circuits – cases that the Court of Appeals cites in reciting the standard for qualified immunity – requires a result different from that of the Fifth Circuit. As shown above, the Fifth Circuit both correctly recited and then applied the standard for the determination of whether a government official is entitled to qualified immunity. Furthermore, whether the Fifth Circuit, or the District Court for that matter, discussed the Sorrells Family's pleadings is immaterial, because the pleadings are more than sufficient.

II.
REGARDLESS OF HOW THE FIFTH CIRCUIT APPLIED THE "OBJECTIVE-REASONABLENESS" PRONG OF THE QUALIFIED IMMUNITY ANALYSIS, THE FIFTH CIRCUIT RULED CORRECTLY

The Officers alternatively assert that the Fifth Circuit's decision on qualified immunity is in conflict with prior decisions of this Court to the extent that the Court of Appeals failed to address the objective-reasonableness prong of the qualified immunity analysis separately from the objective-reasonableness prong of an excessive force claim. In support, the Officers rely on *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151 (2001). Such an analysis, according to the Officers, would establish that their actions were objectively reasonable. The Officers do not describe or elaborate as to how this is so, however. Nor can they. No matter how the Fifth Circuit – or any other Court – applies the objective-reasonableness standards, the Sorrells Family raised enough genuine issues of material fact as to preclude summary judgment.

In *Saucier*, at issue was a different factual scenario than that of the case at bar. The officer whose conduct was at issue in *Saucier* was a military police officer charged with the protection of the Vice President of the United States. 533 U.S. at 197-198. The force used by the officer was merely to hurry a citizen away from an area and place him in a van. *Id.*

This Court held in *Saucier* that no clearly established rule was violated, and, therefore, did not reach the issue of whether the officer's conduct was objectively reasonable. 533 U.S. at 208-209.

At the time of the incident in question, Mr. Sorrells had a "clearly established" "constitutional right" not to be beaten, choke-held, kicked, neglected, OC Sprayed (an entire canister), and/or prodded with a baton while dying. *See* U.S.

Const. amends. IV, V, and XIV; *see, e.g., Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 1871 (1989), and *Garner v. Tennessee*, 471 U.S. at 11, 105 S. Ct. at 1701 ("fundamental interest in [one's] own life need not be elaborated upon.").

Furthermore, under either the qualified immunity analysis or the analysis under an excessive force claim, the evidence before the District Court at the very least raises a fact issue as to whether the Officers' conduct was objectively unreasonable.

CONCLUSION

In sum, the Officers raise no issue that merits review by the granting of a writ of certiorari. The Sorrells Family respectfully prays that the Court deny the Officers' their petition.

Respectfully Submitted,

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